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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~259~~. 39

FLORINE A. AUSTIN, ADMINISTRATRIX OF STERLING T. AUSTIN, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 14, 1890.

14,282.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 9, 1893.

1 In the Court of Claims.

FLORINE AUGUSTA AUSTIN, Administratrix of the Estate of Sterling T. Austin, Deceased,
vs.
THE UNITED STATES.
} No. 13,843.

I.—*Petition. Filed June 5, 1883.*

I. The claimant, Florine Augusta Austin, respectfully represents that Sterling T. Austin, late of the parish of Carroll, in the State of Louisiana, died in said State on the 9th day of July, 1879; that on the 20th day of March, A. D. 1883, claimant was duly appointed administratrix of the estate of said decedent and duly qualified as such; that her said letters of administration are unrevoked and in full force.

II. Claimant further represents and shows to the court that by an act of Congress approved March 3, 1883, it is provided as follows:

"An Act for the relief of the representatives of Sterling T. Austin, deceased.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

"That the claims of the successors in interest and legal representatives of Sterling T. Austin, deceased, late of the parish of Carroll, in the State of Louisiana, for cotton taken by the military and civil authorities of the United States, or by either of them, during the years eighteen hundred and sixty-three, eighteen hundred and sixty-four, and eighteen hundred and sixty-five, in the States of Louisiana and Texas, be and the same are hereby referred to the Court of Claims, with full jurisdiction and power in the said
2 court to adjust and settle such claims, and to render a judgment in said cause for the net amount realized by the United States from the sale of such cotton, as shall appear from the evidence to have been so taken by said authorities; and in such action the said representatives shall be entitled to recover as aforesaid, any statute of limitation to the contrary notwithstanding: Provided, however, that it be shown to the satisfaction of the court that neither Sterling T. Austin, senior, nor any of his surviving representatives, gave any aid or comfort to the late rebellion, but were throughout the war loyal to the Government of the United States."

III. And claimant further represents and shows to the court that during the years 1863, 1864, and 1865 the military authorities of the United States took from the said Sterling T. Austin in the States of Louisiana and Texas a large amount of cotton, to wit, about twelve hundred bales in the year 1863 from the plantation of the said Sterling T. Austin, in Carroll parish, commonly known as "The Three Bayou Place," about twelve miles from Lake Providence, in the said parish, in the State of Louisiana, of the average weight of four hundred and forty pounds per bale, said cotton having been seized, as petitioner is informed and believes, by the order

of General J. B. McPherson, by Lieutenant J. E. Jones, assistant quartermaster of the army of the United States, and others; that the said cotton was disposed of by the United States civil authorities, and the net amount realized from the sale thereof by the United States was, as your petitioner is informed and believes, about one hundred and ninety dollars per bale.

IV. Claimant further represents and shows to the court that in the month of ——, in the year 1865, the military authorities of the United States seized and took from the said intestate, Sterling T. Austin, of his property, at and near the town of Shreveport, in the parish of Caddo, in the State of Louisiana, other cotton than that above described, to wit, two hundred and eighty-five bales, as
3 near as claimant can now aver, of the weight of five hundred pounds per bale; and the whole of the said cotton was, by the defendant, converted to its own use, sold by the United States, and the United States realized from the sale thereof the net amount of forty cents per pound, making an aggregate for the said proceeds of the sale of the said two hundred and eighty-five bales of fifty-seven thousand dollars.

3 V. And claimant further represents to the court and avers that the said defendant, in the month of ——, in the year 1865, in part by the military and in part by the civil authorities of the United States, seized and took of the property of the said intestate, Sterling T. Austin, at Millican, in Brazos county, in Texas; at Limestone county, in Texas; at Courtney, in Grimes county, in the State of Texas; at Galveston, Galveston county, in the State of Texas; at Rusk county, in the State of Texas; at Angelina county, in the State of Texas, and at other places in the said State now to the claimant unknown, other cotton than that above named, to the amount of about five hundred bales, as near as claimant can now aver, such bales being on the average of the weight of five hundred pounds to the bale; and the said defendant, the United States, sold the said cotton and realized therefrom the net sum of about and not less than one hundred and sixty-five dollars per bale, making an aggregate of eighty-two thousand and five hundred dollars for the cotton taken and so appropriated in the State of Texas.

VI. The claimant further represents to the court and avers that the United States wholly deprived the said intestate, Sterling T. Austin, of his said property hereinbefore described, and has never in any way compensated him or his legal representatives
4 therefor, or for any part thereof, but, on the contrary, the defendant "realized" and appropriated to its own use the entire proceeds of the sales thereof, as above averred.

VII. Claimant further represents and shows to the court that the said Sterling T. Austin left him surviving Jane Austin, his widow, Sterling T. Austin, Jr., his son, claimant, Florine Augusta Austin, and Missouri Ada Austin, said widow and son and daughters being the sole heirs at law of the said Sterling T. Austin; that the said Sterling T. Austin died intestate; that the said Sterling T. Austin, Jr., died also intestate, and leaving neither widow nor children,

and of whom claimant and the said Missouri Ada Austin are the sole heirs; the said Sterling T. Austin and Sterling T. Austin, Jr., both having died in the State of Louisiana, where all of the parties at the time of the deaths aforesaid were residing.

VIII. Claimant further shows to the court and avers that neither the said Sterling T. Austin, Sr., nor the said Sterling T. Austin, Jr., nor said widow, Jane Austin, nor claimant, Florine Augusta Austin, nor the said Missouri Ada Austin, gave any aid or comfort to the late rebellion, but they and each of them were and was throughout the war loyal to the Government of the United States.

IX. And claimant asks judgment against the defendant for the sum of three hundred and sixty-seven thousand five hundred dollars, being the net amount realized by the United States from the sale of the cotton hereinbefore referred to and described.

FLORINE A. AUSTIN,
Administratrix of the Estate of Sterling T. Austin, deceased.

SHELLABARGER & WILSON,
Attorneys for Claimant.

5 Post-office address of the claimant, Florine Augusta Austin, Washington, D. C.

Post-office address of Shellabarger & Wilson, attorneys for claimant, Washington, D. C.

CITY AND COUNTY OF WASHINGTON, *District of Columbia*, } *ss:*

Florine Augusta Austin, the claimant in the above case, being first duly sworn, upon solemn oath says:

That she is the duly qualified administratrix of the estate of her father, Sterling T. Austin, deceased; that she has carefully read the foregoing petition by her subscribed, and that she is well acquainted with the contents thereof, and that the statements contained in the said petition are, as she verily believes, true.

FLORINE A. AUSTIN.

Sworn to and subscribed by the claimant in the above cause, Florine Augusta Austin, this fifth day of June, A. D. 1883.

JOHN RANDOLPH,
[SEAL.] *Asst. Clerk Court of Claims.*

6 II.—*Traverse filed June 9, 1883.*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in

such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Ass't Atty General.

7 III.—*Findings of Fact and Conclusion of Law, Filed June 9, 1890.*

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

The claimant is the administratrix of Sterling T. Austin, deceased, who, before and at the time of his death, in 1879, resided in Carroll Parish in the State of Louisiana.

The said decedent at the time of his death was about sixty-four years old. He was born in the State of South Carolina, where he resided with his parents until he was of the age of seven, when with them he removed to the State of Georgia. He was married in said State of Georgia. In 1861 he had a family consisting of his wife, a son, and two daughters, and in February of said year he removed with his family and resided temporarily in the city of New Orleans until about the 1st of April, 1861, when he removed, as hereinafter stated.

II.

During his residence in said State of Georgia, and before his removal therefrom, he acquired what in that country was considered a large estate, consisting of slaves and other property, real and personal. His slaves numbered about one hundred and fifty, of different ages. He was a man of thrift, and great energy and enterprise, in speculation and business matters. In the campaign of 1860 he supported the Bell and Everett party. His sentiments while in Georgia, just before the commencement of the war, were adverse to secession, but he did not express them publicly, owing to his business relations. Leaving his wife and family in New Orleans some time in March, 1861, he went to Carroll Parish, in the State of Louisiana, and purchased in said parish a large cotton plantation near the Mississippi River, consisting of 2,380 acres, for which he agreed to pay the sum of $47,600.

In the spring of 1861 he removed his family and a portion of his slaves and took possession of said plantation, where he resided until about the 1st of January, 1863, in the
8 mean time having removed all his slaves to said plantation. His slaves were taken to said plantation in three divisions, the last having arrived there late in 1861. The deed for said land bears date on the 21st of March, 1861; Austin had been in said parish in the autumn of 1860, but it does not appear that he purchased said farm at that time. At the time he became a resident of said parish the excitement incident to the commencement of the war was very great, and public meetings were held to induce enlistment, and to stimulate

the prosecution of the war by the Confederacy. The said Austin attended one of these meetings held in the spring of 1861, in May or June, about 6 miles from his home. Violent and inflammatory speeches were made to induce enlistment, but it does not appear that he said anything publicly; it does not appear that his presence excited comment or criticism; he did not express any dissent to the proceedings or take issue with the purpose or spirit of the meeting; he was not molested or questioned in any way as to his feelings or political inclinations.

III.

In 1882 a dinner was given to a rifle company about to start for the Confederate army at a place some 8 miles distant from the residence of said Austin, near a landing on the Mississippi River. Austin went to said landing to take the boat, and while waiting he went to the place of the dinner, with his family. It does not appear that he said anything for or against the purpose or object of the meeting. While he personally went where the crowd was he and his family dined with the gentleman at whose place the dinner was given.

IV.

In 1861 and 1862, a policy was inaugurated in Carroll Parish, by which planters subscribed negroes to work for persons who were absent in the Confederate army; that policy became general throughout the State. In the latter part of 1861 a meeting was held a short distance from the home of Mr. Austin, which was the first meeting of that kind; he attended that meeting, but it does not appear that he said anything. At that meeting a subscription was started, but the evidence does not show who subscribed the services of negroes. In March, 1862, a captain in the militia in company with a Confederate soldier and a citizen went to the plantation of Mr. Austin to see whether he would do anything by way of giving negro help to assist as aforesaid. They found Mr. Austin engaged with his slaves in the field. The captain had a brief interview with Austin, but it does not appear what was said. At the end of the interview Austin called to one of the negroes and turned him over to the possession of the captain. The negro was taken and placed to work on the farm of a man who was then absent in the Confederate service, and remained there several months working on his plantation.

At the time this transaction took place, there was great excitement and feeling in that neighborhood on the subject of the war; and it would have been unsafe for a person to decline to comply with the demand for slave labor, to assist those who were serving in the Confederate army. At the time the demand was made on Austin, it does not appear that he protested against the demand, or that he objected in any way, nor that he
9 made any attempt to withdraw the negro from the plantation.

In the winter or spring of 1862, a barbecue was held about 8 miles from the residence of Austin intended to encourage enlistments in the Confederate army. Austin attended that meeting. It does not

appear that he said anything publicly or in another manner to assist in the object of the meeting. It does not appear that his presence excited any attention either by way of criticism or commendation.

V.

In December, 1862, the Federal Army in the prosecution of the war on the line of the Mississippi River, in going south came to Ashton Landing, which was a point near the plantation of Austin, at which his slaves, then numbering about one hundred and fifty, were living. At the time of the approach of the Federal forces to Ashton's Landing there was a general order, of the Confederate authorities, that on the approach of the Uuion Army, the planters should destroy their cotton, and move further back from the river, with their negroes and other movable property. At said time the plantation and slaves were in the control and under the supervision of an agent of Austin, he being at the time in the State of Georgia. Upon information to said agent that the gun-boats of the United States were approaching near to said Ashton's Landing, the said agent removed, the said slaves, back from the river, in order that they might not fall within the lines of the Federal Army. There was no force of the Confederate army at that time near said landing. The first removal of the slaves was to a place about 18 miles from the Three Bayou place. After the return of Austin he went to the place where said slaves had been removed by his agent as aforesaid; Austin made no effort to return the slaves to the plantation. From said point, 18 miles from said plantation, Austin removed his slaves to Monroe, La.

In August, 1862, Austin left home, went to the State of Texas, and from there to the State of Georgia; from the last place he returned as aforesaid after the removal of his slaves by his agent In going to his home from the State of Georgia, he passed with his family, within the United States lines, and thence into the Confederate lines. The person suggesting the removal, from the three bayou places was not connected with the Confederate authority. After staying some time at Monroe, La., Austin removed his slaves to the city of Shreveport, this was some time in the summer of 1863. Shreveport at that time was an important point of the Confederate army in the State of Louisiana. The Confederate government was at that time building and repairing gun-boats for the Confederate service at that said point. The slaves of Austin at that time, besides the women and children, numbered sixty.

During his stay at Shreveport some of his men were pressed into the Confederate service and were put to work on the fortifications around said city, and upon the gun-boats which were being made and repaired at said place; said slaves remained in the possession of said Austin at Shreveport, eastern Texas, and at San Antonio, until 1865. While at San Antonio, Tex., the slaves were hired and paid the proceeds of their labor to Austin. After the surrender of Kirby Smith, in 1865, Austin told his slaves that they were free, and advised them to stay where they were.

While at Shreveport Austin was engaged in buying and selling cotton and goods. After his removal from Shreveport he lived at San Antonio, where he also traded in cotton.

VI.

After leaving the Three Bayou place hereinbefore stated, and while at the city of Shreveport, La., in the year 1863 or 1864, he permitted or authorized his slaves to hire the teams with which they were entrusted belonging to him, and persons having contracts for the delivery of wood to the Confederate authorities hired those teams from the slaves, with the slaves as drivers, and they were used in the delivery of wood to the Confederate arsenal. Austin received the pay for the men and teams.

During the winter of 1863 and 1864 Austin removed a number of his slaves to the plantation of his relative, about 75 miles from Shreveport. Subsequently, during the winter or spring, he took those slaves back to Shreveport. The Confederate forces were actively engaged in building gun-boats and strengthening the defenses of the post, and slaves of Austin had previously been impressed in such work.

VII.

The slaves of Austin before their removal to Carroll Parish as aforesaid, were located on a plantation in the State of Alabama belonging to said Austin, which had been purchased by him a short time before his removal to Louisiana.

VIII.

The military forces of the United States captured at the Three Bayou place 250 bales of cotton, which belonged te said decedent, and which was turned over to the Treasury agents. The Treasury agent of the United States seized in the State of Texas 110 bales of cotton belonging to said decedent. On the 350 bales seized as aforesaid the defendants have realized the sum of $59,287. Austin knew at the time of seizure that the cotton for which the allowance is made was seized by the authorities of the United States. He was in Washington in 1867, enaged in the prosecution of other claims.

IX.

Upon the foregoing facts the court is not satisfied that Sterlin- T. Austin did not give aid or comfort to the late rebellion, and the court is not satisfied that he was loyal throughout the war to the Government of the United States; but the court is satisfied that the surviving representatives did not give any aid and comfort to the late rebellion, but were throughout the war loyal to the Government of the United States. The court finds Sterlin T. Austin disloyal.

Conclusion of Law.

The court decides upon the foregoing facts that the petition be dismissed.

11 IV.—*Opinion of the Court.*

WELDON, J. delivered the opinion of the court:

This is an extraordinary and important case. It is extraordinary, on account of many matters appearing in its history, and testimony; important because of the large amount of money in controversy; and the questions of law involved in its decision. The attention of the court was occupied, many days in the trial; and counsel have exhaused the resources of great professional ability in the presentation of the law, and evidence. More than two thousand, printed pages of testimony, have been discussed and considered, in the determination of the questions of law, and fact, presented by this record. More than 150 witnesses have been examined, many of whom, have been questioned, to an extent, most unusual in judicial investigation. Many of them, have the highest intelligence, while others have the lowest order of mental capacity. Some, are subject to the influence of a great interest in the result of the cause, while others are impressed by great prejudice, against one side, or the other.

The record discloses, a sharp conflict of testimony, not only between different witnesses; but the testimony of the same witness, taken at different times. It is not strange, that a claim of this magnitude, originating more than a quarter of a century ago, composed of distinct and separate transactions, happening as it is alleged, in different and widely separated localities, dependent upon the knowledge of many persons, should have, in the evidence many contradictions, and conflicts; but it is strange, that the record and trial, should abound with so many insinuations and charges, against the veracity of witnesses, the conduct of parties, and the action of Government agents. It is perhaps unnecessary, that the Court should animadvert upon any of the objectionable features of this proceeding, as exhibited in the record; they do not become important, as the material facts are unaffected by them. They do not taint, or impair the channels, from and through which, we have drawn conclusions of fact, decisive of the issues presented for our determination. The jurisdiction of the Court is dependent on the following statute:

An Act for the relief of the representatives of Sterling T. Austin, deceased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the claims of the successors in interest and legal representatives of Sterling T. Austin, deceased, late of the parish of Carroll, in the State of Louisiana, for cotton taken by the military and civil authorities of the United States, or by either of them, during the years eighteen hundred and sixty-three, eighteen hundred and sixty-four, and eighteen hundred and sixty-five, in the States of Louisiana and Texas, be and the same are hereby referred to the Court of Claims, with full jurisdiction and power in the said court to adjust and settle such claims, and to render a judgment in said cause for the full amount realized by the United States from the sale of such cotton, as shall

appear from the evidence to have been so taken by said authorities; and in such action the said representatives shall be entitled to recover as aforesaid, any statute of limitation to the contrary notwithstanding: Provided, however, that it be shown to the satisfaction of the court that neither Sterling T. Austin, senior, nor any of his surviving representatives, gave any aid or comfort to the late rebellion, but were throughout the war loyal to the Government of the United States. (March 3, 1883, ch. 111, 22 Stat. L., 804.)

Under this statute, the claimant filed a petition, alleging the seizure of cotton, in the states of Louisiana, and Texas, amounting in the aggregate to 1950 bales. In the trial of the cause, all cotton was abandoned, except the alleged seizures, at the Three Bayou place, Shreveport, Rush County, Millican and Galveston. For the cotton so seized, as alleged, it is claimed, that the defendants realized the sum of $367,500. By the terms of the law, the Court is empowered to adjust and settle such claims, if the cotton belonged to the
12 decedent, and render a judgment, for the net amount, realized by the United States from the sale of such cotton, "Provided, however,' that it be shown to the satisfaction of the Court, that neither Sterling T. Austin Sen., nor any of his surviving representatives, gave any aid or comfort, to the late rebellion; but were throughout the war, loyal to the Government of the United States."

The proviso, makes it the duty of the Court, to determine as a preliminary question, whether the decedent, or any of his surviving representatives, gave any aid or comfort to the late rebellion, or were loyal, throughout the war, to the government of the United States. That inquiry confronts the Court at the threshold of its investigation; and must be determined, antecedent to the consideration of any other branch of the case. If Sterling T. Austin, was not loyal, during the late war, within the meaning of the law as it now exists, then it is wholly immaterial. whether the cotton was seized or not, the power to adjudicate is limited by that inquiry.

His legal condition of loyalty, in relation to the rights of the claimant, under the statute giving us jurisdiction, is to be determined by the law, either without reference to his acts, during the war, or by the law applied to those acts, as determining the question of actual loyalty.

It is contended, that general amnesty, by its own force, makes the full proof of loyalty required by the Special Act—and in support of this contention our attention is directed to several authorities.

On the 25th of December A. D. 1868, the President issued a proclamation in the following words:

Now therefore be it known that I Andrew Johnson, President of the United States by virtue of the power vested in me by the constitution, and in the name of the Sovereign people of the United States do hereby proclaim and declare unconditionally and without reservation to all and every person who directly or indirectly participated in the late insurrection or rebellion a, full pardon and amnesty for the offense of treason against the United States in adhering to the enemies during the late civil war, with restoration

of all rights, privileges, and immunities under the constitution and laws which have been made in pursuance thereof.

This is the last act of clemency, on the part of the general government; and was intended, and did extend to all the full measure of pardon and amnesty.

Under and by virtue of the policy, and effect of this proclamation, there passed to Sterling T. Austin "all rights, privileges, and immunities" which could by the exercise of executive pardon, in its broadest sense, pass to a citizen of the United States. The question in this connection, is not exactly the legal effect of a general pardon; that effect may be broad and far-reaching, but it may not thereby follow, that the claimant is relieved from proving the personal loyalty of the decedent under the proviso of the statute. It is said

A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that, in the eye of the law, the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. (Garland, *ex parte*, 4th Wall. Page 33.)

The Supreme Court in determining the legal effect of what is known as the Drake amendment to an appropriation law said:

But the language of the provision shows plainly that it does not intend to withhold appellate jurisdiction, except as a means to an end. Its great and controlling purpose is to deny to pardons,
13 granted by the President, the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them, and give them effect in cases like the present, as equivalent to proof of loyalty. (Klein *vs.* United States, U. S. R., 250.)

At the time of this decision, the Supreme Court had appellate jurisdiction of judgments of the Court of Claims; and this court exercised all the powers incident to one of the inferior Courts, which by the constitution Congress were authorized to establish; and the Supreme Court, said that the this amendment was not intended to withhold appellate jurisdiction, except as a means to an end. The amendment was held to be void, for the reason that its intent, purpose, and effect was to impair the judicial integrity of the Supreme Court, and thereby lessen the constitutional function of one of the co-ordinate branches of the Government.

On the 25th day of December, 1868, the term of the Captured and abandoned property Act, within which suits might be brought had expired; and by a joint resolution of Congress passed on the 30th of March 1868, the proceeds of property affected by said act had been covered into the Treasury" in pursuance to the provisions and re-

quirement of said resolution. (Briggs Ex, &c, *vs.* U. S., 25 C. Cls p.) In the absence of the provisions of said act, the loyal owner of cotton, seized within the dominion and power of the confederacy, had no legal or equitable claim, on the proceeds of such cotton, against the right of the United States, to dispose of such proceeds, in such manner, as in their discretion, might be expedient. In this connection we cite

Neither does the pardon affect any rights which have invested in others directly by the execution of the judgment for the offense, or which have been acquired by others while the judgment was in force. If, for example, by the judgment a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale had been paid to a party to whom the law has assigned them, they can not be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid into the Treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress.

Moneys once in the Treasury can only be withdrawn by an appropriation by law. However large, therefore, may be the power of pardon vested in the President, and however extended may be its application, there is this limit to it as there is to all his powers, it can not touch moneys in the Treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power.

The views here expressed have been applied in practice, it is believed, by the executive departments of the Government in 1856, and the question was submitted by the Secretary of the Treasury to the Attorney-General, whether under a pardon of the President remitting a forfeiture to the United States imposed by a judge of the United States district court, the proceeds of the forfeiture deposited by the marshal in one of the public depositories to the credit of the United States, but not brought into the Treasury by a recovering warrant, could be refunded to the marshal and through him to the party entitled in execution of the remission granted by the President; and the Attorney-General replied that the pardoning power was completely vested in the President and did not require in its exercise any aid from Congress, nor could it be curtailed by Congress, but that if the money had actually passed into the Treasury it could not be refunded without an act of Congress; for the Constitution itself, in the provision that "no money shall be drawn from the Treasury but in consequence of an appropriation made by law," opposed as an insuperable obstacle to such a proceeding, and that the provision was of equal efficiency with the pardoning power, and operated as a restriction upon it.

The effect of a pardon upon the condition and rights of its recipient have been the subject of frequent consideration by this court, and principles have been settled which will solve the question presented

for our determination in the case at bar. (*Ex parte* Garland, 4 Wall., 333; Armstrong's Foundry, 6 *id.*, 766; U. S. *v.* Padelford, 9 *id.*,
14 531; U. S. *v.* Kline, 13 *id.*, 128; Armstrong *v.* U. S., 16 *id.*, 155; Pargoud *v.* U. S., *id.*, 156; Carlisle *v.* U. S., 16 *id.*, 147; Osborn v. U. S., 91 U. S., 474.) A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offense that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position.

But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the Government any obligation to give it. The offense being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. [Neither does the par on affect any rights which have been vested in others directly by the execution of the judgment for the offense, or which have been acquired by others whilst the judgment was in force. If, for example, by the judgment, a sale of the offenders property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender * * * So also if the proceeds have been paid into the Treasury, the right to them has so far become vested in the United States, that they can only be secured to the former owner of the property through an act of Congress] * * * Where, however, property condemned, or its proceeds have not thus vested, but remain under the control of the Executive, or of officers subject to his orders, or are in custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon. (Knote *vs.* United States, 95, U. S. 154.)

When the pardon, upon which it is claimed, the decedent was in law made loyal to the United States was issued, the relation of Trustee, upon the part of the government towards the proceeds of captured property had ceased by limitatoin of the statute from which the trust originated, and by covering the proceeds into the Treasury in accordance with the joint resolution, of the 30th March 1868. (15 Stat. L., 251.) The pardon although general, had no legal effect upon any right which the decedent had in the proceeds of cotton which might have been taken from him during the war. A pardon does not originate rights—it removes penalties and punishment—in the language of the Supreme Court "it releases the punishment, and blots out of existence the guilt, so that in the eye

of the law, the offender is as innocent as if he had never committed the offence."

The Captured and abandoned property Act established a new policy towards the property of technical public enemies, by providing for the restoration of the proceeds of property, captured from the loyal citizens, within the territory of the Confederate belligerent; but that policy having terminated, at the end of two years, from the suppression of the insurrection, after the termination, the Government ceased to hold such property, as a trustee; and the same passed to the control, and legal ownership of the government, as captured property, unaffected by any legal or equitable rights, in favor of the original owner.

The effect of general amnesty, proclaimed by the President, on the 25th of December 1868, was to make Sterling T. Austin loyal in law, and so far as his legal rights were concerned, he stood upon an equality with every other citizen of the United States, his rights were similar, neither more nor less. Whatever may have been his conduct during the war, he was forgiven; and he measured his legal status commensurate with the most loyal adherent of the federal cause. That condition was the result of the general amnesty, which in the exercise of Executive clemency as recognized by the Supreme Court made him as innocent as if he had never committed the offense. That condition of legal loyalty, was known to Congress when the act of our jurisdiction was passed; and this leads us to examine the force and effect of the proviso forming part of the law.

The condition of legal loyalty, originating from, and dependent upon, the effect of the proclamation of general amnesty, is a condition to be recognized by Courts and Congresses, without proof, it is a presumption arising in favor of persons, who either directly or indirectly, participated in the insurrection, and is not to be shown; but is to be presumed coexistent with the being of the person. When Congress required the claimant "to show to the satisfaction of the Court" that Sterling T. Austin was loyal to the government of the United States, did they intend that loyalty arising from general amnesty should supply the demand of the statute? For the purpose of ascertaining the will of Congress, in this connection, we are asked to look into the circumstances under which the act was passed, and the contemporaneous reasons which induced its passage. That it is our duty to do so, as contended by the defendants, presents to the consideration of the Court grave questions of judicial construction. As to how far a Court may enquire into the parliamentary history of a statute, embracing its passage through the legislative department, is a question on which many decisions have been made not entirely uniform and consistent in their doctrines.

It is said by the Supreme Court:

In expounding this law the judgment of the court can not, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for sup-

porting or opposing amendments that were offered. The law, as it passes, is the will of the majority of both Houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language they used, comparing it when any ambiguity exists with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed. (Aldrich *vs.* Williams, 3. Howard.)

So it is said:

Nor are we willing to accept the debates that are reported as occurring in Congress at the time of the passage of the deficiency appropriation act of March 3, 1873, as evidence of the meaning of the clause on which the controversy in this case depends.

The question is whether, according to its correct construction, that clause authorized the parties to execute the agreement into which they entered. (District of Columbia *vs.* Washington Market Co. 108 W. S. 254.)

A badly expressed and apparently contradictory enactment (such as the one above mentioned) interpreted by reference to the journals of Congress, where it appears that the peculiar phraseology was the result of an amendment introduced without one reference to the language in the original bill. (Blake *vs.* National Banks. 23 Wall., 308.)

Courts take judicial notice of some circumstances outside of an act which go to show its meaning, and in doing so they frequently take a wide range of illustration and investigation from public records, public documents, general and local history, and other matters of such general and public notoriety as may be supposed to have been in the minds of all the legislators when the act was passed, but they never admit the opinions and evidence of individual witnesses for that purpose. (The Slaughter House Cases, 16, Wall., 37; Blake *vs.* National Banks, 23 Wall., 317; Brown *v.* Piper, 91 U. S. R., 42; Blake *v.* United States, 103 *id.*, 235; Wilson *v.* Spalding, 19 Fed. Rep., 304; State *v.* New Orleans Pacific Railroad, 30 La. Ann., 980; People *v.* Stevens, 71 N. Y., 527; Fisher *v.* United States, 15 C. Cls. R., 323; Fendall *v.* United States, 16 *id.*, 121.) Adam Badeau *Vs.* The United States. 21 C. Cls. 48.

It is not sought, in this case, to introduce the Congressional Record for the purpose of showing what the individual members of Congress said in debate on the passage of the bill; but it is claimed
16 that a report of a committee of the Senate, accompanying the bill, is proper to be considered by the court, that being a public document, within the meaning of the decision of this Court in the case last cited. It seems to us in view of all the authorities, that a report of a committee, of either house of congress, unanimous in its character, submitting and accompanying an amendment to a bill, may be considered by the Court in construing such amendment, in a case of doubtful interpretation. It is an undoubted rule of construction that the language of a statute is the best and highest criterion of construction; but where such language fails to perform the function of construction, then other lights

may be used, in arriving at a conclusion, as to the intent of the legislature.

The very plausible and forcible arguments, made by counsel on either side of this case, shows the necessity of the rule, which we recognize. One contending that the loyalty of the statute is legal loyalty as it may be termed which arises from general amnesty; and the other insisting that the statute requires an actual loyalty on the part of Sterling T. Austin, which arises from his adherence to the cause of the United States through the entire period of the war. There is that ambiguity, as indicated from those diverse contentions, which cannot be clearly settled by the term of the law; and conceding for the sake of argument, in this connection that it was competent under the constitution, for Congress to limit the jurisdiction of the Court by the requirement of actual loyalty, it is proper for us to refer to a report of the Senate in construing the proviso of the statute of our jurisdiction. In the report of the committee reporting the amendment it is said:

From the evidence before the committee the loyalty of the family seems to be well established; yet, in order that this question may not be foreclosed on testimony merely *ex parte*, your committee recommend that the bill be amended by adding after the last words the following: "Provided, however, That it be shown to the satisfaction of the court that neither Sterling T. Austin, sr., nor any of his surviving representatives, gave any aid or comfort to the late rebellion, but was throughout the war loyal to the Government of the United States."

With this amendment your committee report the bill back to the House, with the recommendation that it do pass.

If any doubt can arise, as to the purpose of Congress, in the enactment of the amendment, it seems to us that the report of the committee dissipates such doubt, and leaves the intention clear and unquestionable. But is it not clear, from the language used, what Congress intended? Presumptions are not proven, but arise from conditions, and if the law in the preservation of the rights of pardon presumed Sterling T. Austin to be loyal within the meaning of the act, then how useless is the requirement "that it be shown to the satisfaction of the court" that he gave no aid or comfort to the late rebellion.

The meaning of words involves the question of intention, or what sense did Congress intend to use them in any given act.

In Young *vs.* U. S. (97 U. S. R., 62), it was said by Waite, Ch. J.:

There can be no doubt that the words "aid and comfort" are used in the statute (the abandoned or captured property act) in the same sense they are in the clause of the Constitution defining treason (Art. 3, sec. 3).

The act under consideration was passed in 1883, many years after the decision in Klein's Case in 1871, and in Young's Case in 1877. In view of those decisions Congress used the words "aid and comfort" and it must be assumed that their meaning was intended to be different from that which the Supreme Court had con-

17 strued them in the abandoned or captured property act, or otherwise the words would have been meaningless and the whole proviso would be without force. It is to be presumed from those facts, as well as from the manner in which the proviso was inserted, that without this important proviso Congress would not have passed the act. We must so construe it as to give effect to the will of Congress.

It being the opinion of the Court, that the proviso intended; to require by proof of personal loyalty, that it be shown to the satisfaction of the Court, that Sterling T. Austin "gave no aid or comfort to the late rebellion" the question arise, upon the contention of the claimant, whether Congress had the constitutional right, to attach that requirement to the law, giving the Court jurisdiction. It is insisted, that such a requirement, against the legal effect of general amnesty, would be in derogation of the judicial function of the Court to render a judgment. That the Court being possessed of the power, to act strictly judicial, it must have the right to determine, questions of fact, consistent with its power to act judicially. When Congress, in the exercise of its constitutional prerogative, passed the special statute, submitting to the determination of this Court, the question of the legal right of the claimant, to recover moneys in the Treasury, it was not legislating upon the rights of person, or property, incident to the claimant, which are the ordinary subjects of judicial investigation; but upon a right, originating and recognized by the very act, to which the condition or proviso is annexed.

The condition of showing the personal loyalty of Sterling T. Austin, is a material and indispensable element, in the right given by the statute, to have adjudicated the claim for the alleged cotton, the proceeds of which are now as they have been since 1868, a part of the moneys of the United States. If the pardon, incident to the general amnesty, did not affect a right, which the claimant might have had in the proceeds of the cotton, under the captured and abandoned property act, then Congress in the requirement of loyalty in fact, violated no judicial right of property inherent in the claimants. While the Court of Claims, is one of the inferior Courts, contemplated by the constitution, its organization is peculiar in this, that it differs in the subject matter of its jurisdiction, having no power to adjudicate upon the ordinary rights of citizens, and which are preserved and protected, by Courts of federal common law jurisdiction.

The consideration of the effect of the proviso, upon the jurisdiction of the Court, aside from its effects upon the rights of the parties (J. R.), may be profitably considered in this connection. The subject matter of litigation is the claim for cotton taken, as it is alleged by the military forces of the United States, in the State of Louisiana and in the State of Texas by the Treasury agent during the late war, and that claim is referred with full jurisdiction, and power in this Court, to adjust and settle such claim, and to render judgment in said cause "Provided however that it be shown to the satisfaction of the Court that neither Sterling T. Austin, nor any of

his surviving representatives, gave any aid or comfort to the late rebellion, but were throughout the war loyal to the government of the United States." If the Court shall determine from all the evidence, that Austin was not loyal, as required by our construction of the proviso, what power if any, can we exercise with reference to the judicial investigation of the claim for the alleged cotton. Without that preliminary finding, we can not settle the claim" nor "render a judgment." Is it not therefore a limitation upon the Jurisdiction of the Court by the requirement of a personal qualification upon the part of the claimant.

In the case of Haycraft *vs.* The United States (22. Wall,) it is said:

This case has been argued to some extent as though it involved the statute of limitation. To our minds the question is one of jurisdiction. A sovereign can not be sued in our courts without his consent; this is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution; that being done the jurisdiction is established and he may proceed; otherwise not.

Again, on page 95, he says:

But the commencement of the suit within the prescribed time was a condition precedent to the ultimate relief; the right to recovery was made to depend upon the employment of the remedy provided by the act. There was no promise, even under the rulings of that case, except as to such as should commence the suit in time, and upon trial be in condition to bring themselves within the requirements of the act. Pardon and amnesty had no effect except as to such as sue in time.

Again, on page 98, he says:

But the same statute which authorized the capture gave a right to certain persons to demand and receive a restoration of their property taken. Coupled with a right to demand was a provision for the remedy by which it was to be enforced. Both the right and the remedy are, therefore, created by the same statute, and in such cases the remedy provided is exclusive of all others. The demandant in this case neglected to avail himself of the remedy provided, and consequently he is without any. That remedy was the only one of which the Court of Claims, or any other court, has been authorized to take jurisdiction. It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided. (J. R.)—Hart *vs.* U. S., 16 C., Cls. 459; and Hart *vs.* U. S., 118 U. S. R. 62.

If Congress, intended by the proviso, to compel the claimant to show, to the satisfaction of the court, that Sterling T. Austin, did not in fact give aid and comfort to the public enemies of the United States, and that requirement is unconstitutional, what effect has the unconstitutionality of that provision on the remaining parts of the statute? It does not follow, that because one provision of the statute is void that all other portions of the law, fail to effectuate the intention and will of Congress. The rule is succinctly stated in the case of the Packet Company *vs.* Kiokuts, (95 U. S. R. 80).

Statutes which are constitutional in part only will be upheld and enforced so far as they are not in conflict with the constitution, provided that the allowed and prohibited parts are severable." (Balsom *vs.* Franks, 120 U. S. R. 678. Presser *vs.* Illinois, 116 U. S. R. 252. Warren *et al. vs.* Mayor & Alderman of Charleston, 2d Gray 84. State Ex. Rel. Walsh *vs.* Dousman 13, Wis. 541.)

Can the proviso be separated in its effect from the other portions of the statute? Is it severable within the meaning of the rule prescribed by the supreme court. The proviso in this case does not operate upon a portion of the act; but avoids in a certain contingency the whole, by way of defeasance, so that it is impossible to sever it from other portions of the law. It was intended, and does in express terms, qualify the antecedent portions of the act. If in legislating upon a gratuitous right, Congress imposes a condition which is unconstitutional as applied to a vested or conceded right, the whole act must fail to accomplish the purpose.

Courts have held, that parties are estopped, from denying the constitutionality of a local statute, by participating in the procurement of its passage, and the enjoyments of its benefits. (Moran *vs.* Com. of Miami County, 2 Black, 272. Ferguson *vs.* Landram, 5 Bush, 230.) Courts are extremely reluctant to declare an act unconstitutional, and never do so except from absolute necessity of construction. Upon this point the supreme court have said (19, Wall. 673)

It is an axiom in American jurisprudence that a statute is not to be pronounced void upon this ground (of unconstitutionality) unless the repugnancy to the Constitution be clear and the
19 conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. The particular clause of the Constitution must be specified and the act admit of no reasonable construction in harmony with its meaning. The judicial function involving such a result is one of delicacy, and to be exercised always with caution.

And in Livingston County *vs.* Darlington (101, U. S., 410), it is said—

The question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which is seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be construed as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

The result is, that we are compelled to hold, that the statute in this case requires, the claimant to show that her decedent, was loyal in fact, and that proof, from general amnesty, is not equivalent to the proof required by the proviso of the statute. This construction,

remits the Court to the inquiry, whether from the facts established by the testimony, the decedent is shown to have been loyal throughout the war to the government of the United States. Upon this branch of the case, we have not found simply, the ultimate fact of loyalty or disloyalty; but have found a series of facts, so that the law, may determine as a legal result, whether from all the facts established, the decedent was loyal or disloyal.

The Court has found substantially the following facts:

The claimant is the administratrix of Sterling T. Austin, deceased, who before and at the time of his death in 1879, resided in Carroll Parish, in the State of Louisiana. At the time of his death, he was 64 years old, and was born in the State of South Carolina, where he resided until he was seven years old when with his parents he removed to the State of Georgia. He was married in the State of Georgia.

In 1861, he had a family, consisting of his wife, son, and two daughters, in February of said year he removed with his family, and resided temporarily in the city of New Orleans until about the first of April, 1861, when he removed to said parish.

During his residence in the State of Georgia, he acquired, what in that country, was considered a large estate consisting of slaves, and other property, real and personal. He was a man of thrift, and great energy in business matters.

In the campaign of 1860 he supported the Bell and Everett party. His sentiments while in Georgia, just before war, were adverse to secession; but he was careful in the expression of his opinion owing to his business relations.

Leaving his wife and family, in New Orleans, in March, 1861, he went to Carroll parish, and purchased a large cotton plantation, near the Mississippi River, containing 2380 acres for which he agreed to pay the sum of $47,600. In the spring of 1861, he removed his family, and a portion of his slaves, and took possession of said plantation, where he resided until the latter part of 1862, or first of 1863.

His slaves, consisting of about 160 persons, were taken to said plantation at different times; but all during 1861. The deed to the plantation bears date of March 21, 1861, said Austin had been in said parish in 1860, but it does not appear that he purchased said plantation at said time.

20 At the time he became a resident of said parish, the excitement incident to the commencement of the war, was very great, and public meetings were held to induce enlistments, and to stimulate the vigorous prosecution of the war. Austin in May or June, attended one of these meetings, held about six miles from his home. Violent and inflammatory speeches were made to induce enlistment; but it does not appear that Austin said anything publicly, it does not appear that his presence caused comment or criticism. He did not express any dissent to the proceedings, or take issue with the purpose or object of the meeting, he was not molested or questioned in any way, as to his feelings or political inclinations.

In 1862, a dinner was given to a company about to start for the confederate army. On the day of the dinner Austin went to a landing near the place of the dinner and while waiting for the boat he went with his family to the place of the dinner. It does not appear that he said anything for or against the object of the meeting. While he personally went where the crowd was he and his family dined with the gentleman at whose house the dinner was given.

In 1861, and 1862, a policy was adopted, in Carroll Parish, by which planters subscribed, the services of negroes to work for persons absent in the army, and that policy became general throughout the State. In the latter part of 1861 a meeting was held a short distance from the residence of Mr. Austin, which was the first meeting of that character. Austin attended the meeting; but it does not appear that he said anything; A subscription was started but it does not appear who subscribed.

In March 1862, a captain in the militia, in company with a confederate soldier, and a citizen went to the plantation of Mr. Austin to see what he would do in the way of slave labor for those absent in the army. They found Mr. Austin engaged with his slaves in the field, the captain had a brief interview with Mr. Austin but it does not appear what he said.

At the time of the interview, he called one of his slaves, and turned him over to the possession of the captain. The negro was taken, and placed to work, on the plantation of a man who was in the confederate army and remained there several months.

At the time of this transaction, there was great excitement and feeling in the neighborhood, and it would have been unsafe for any person to have refused to comply with the demand for slave labor, to assist those in the military service. It does not appear, that at the time of the demand, that Mr. Austin protested or objected, or that he made any attempt to withdraw the slave from the plantation.

In the winter or spring of 1862, a meeting was held about 8 miles from the residence of Mr. Austin to encourage enlistments in the confederate army, Mr. Austin attended the meeting. It does not appear that he said anything publicly or in any other manner to assist in the purpose or object of the meeting. It does not appear that his presence excited any attention, by way of criticism or commendation.

At the time the federal army, in the prosecution of the war, on the line of the Mississippi river going south, came to Ashton's landing, which was a point near the plantation of Mr. Austin, the plantation with about 160 slaves was in the possession of the agent of Mr. Austin as hereinafter stated.

There was a general order, of the confederate authorities,
21 that on the approach of the Union army the planters should destroy their cotton, and move further back from the river, with their negroes and other movable property. At said time, the plantation, and slaves, were in the control and under the supervision of an agent of Austin, he being at the time in the state of

Georgia. Upon information to said agent, that the gun boats of the United States, were approaching near to Ashton's landing, the said agent removed the said slaves, back from the river, in order that they might not fall within the lines of the federal army. There was no force of the confederate army, at that time near said landing. The first removal of the slaves, was to a place about 18 miles from the Three Bayou place. After the return of Austin, he went to the place, where said slaves had been removed by his agent as aforesaid; Austin made no effort to return the slaves to the plantation. From said point 18 miles from said plantation, Austin removed his slaves to Monroe La.

In August 1862, Austin left home, went to the state of Texas, and from there to the state of Georgia, from the last place he returned as aforesaid, after the removal of his slaves by his agent. The person suggesting the removal was not connected with the confederate authority. After staying some time at Monroe, La., Austin removed his slaves to the city of Shreveport, this was some time in the summer of 1863. Shreveport at that time, was an important point of the confederate army, in the state of Louisiana. The confederate government, at that time, was building and repairing gunboats, for the confederate service at that said point. The slaves of Austin at that time, besides the women and children numbered 60.

During his stay at Shreveport, some of his men were pressed into the confederate service—put to work on the fortifications around said city, and upon the gun boats, which were being made and repaired at said place, said slaves remained in the possession of said Austin at Shreveport, eastern Texas, and at San Antonia until 1865. While at San Antonia, Texas, the slaves were hired and paid the proceeds of their labor to Austin. After the surrender of Kirby Smith in 1865, Austin told his slaves that they were free, and advised them to stay where they were.

While at Shreveport, Austin was engaged in buying and selling cotton and goods.

After leaving the Three Bayou place, herein before stated, and while in the city of Shreveport, La., in the year 1863, or 1864, he permitted or authorized his slaves to hire the teams with which they were entrusted belonging to him, and persons having contracts for the delivery of wood to the confederate authorities, hired those teams from the slaves, with the slaves as drivers, and they were used in the delivery of wood to the confederate arsenal.

During the winter of 1863 and 1864 Austin removed a number of his slaves tc the plantation of a relative about 70 miles from Shreveport. Subsequently during the winter or spring he took those slaves back to Shreveport. The confederate forces were actively engaged in building gun boats and strengthening the defence of the post and slaves of Austin had previously been impressed in such work.

We have given in substantial detail the material facts shown by the findings, which tend to prove the legal status of decendent during the war; and from those facts we must deduce, the conclusion of

fact whether Sterling T. Austin, was, or was not, loyal to the
22 Government of the United States, according to the legal requirement indicated by the preliminary discussion of this opinion. Living as he did, within the territory dominated by the force of the southern confederacy, and in states, assuming to exercise the alleged right of secession, the legal presumption is that he was disloyal to the United States, and an adherent, to the power of the confederate government. Upon his administrator, rests the burden of showing, to the satisfaction of the Court, that he gave no aid or comfort to the insurgents; but was loyal, throughout the war, to the defendants. The presumptions of loyalty are in favor of a person, living in a loyal state, as they are against those, living in an insurrectionary state (Turner *vs.* The United States 3, C. Cls. 403).

If there is a failure of facts, to establish that condition, then the presumption attaching to the decedent, because of his domicil, is not overcome, and that issue must be found in favor of the defendants. (Dothago *vs.* United States 4th. C. Cls. 208.)

The facts show that Austin, at the commencement of the war, resided in the State of Georgia, where he had always lived, and had been identified with that political organization in American politics, which made the enforcement of the law, and the maintainance of the union, the cardinal principle of its faith; and if that theory of political policy had been sufficiently strong, to dictate the course of states, no secession would have been attempted, and no war would have occurred. But that sentiment was powerless, against the prevailing and popular opinion, in all of the states, in which the decedent resided during the war; and because of that, he was subjected to a political condition, which he would not have inaugurated, but in which he tacitly acquiesced., and from which, he made no effort to escape, until the confederacy was beaten, in the last strong-hold of its existance. When the government of the United States became powerless for his protection, in the state of Georgia and Louisiana, he was not compelled to jeopard his life, in senseless adherence to the cause of the federal government, and his yielding to an overpowering force, worked no forfeiture of his rights; but he was under legal obligations, to submit to and accept the protection of the federal power, as soon as that could be done, consistently with the reasonable safety of himself, and his family.

The secession of the state of Louisiana, and the preparation for war, in all of the seceding states, did not seem to deter him, from large investments, looking to the production of cotton, which in a short time became one of the great resources of confederate credit and power. While the facts found, show a tardy, and somewhat reluctant, acquiescence in the means employed, to assist the confederate cause, by the encouragement of enlistment, and other modes, it does not appear, that during his residence in any of the states, in which he resided during the war, that he suffered any molestation, or personal injury, because of his want of fealty to the cause of the south.

At the time he became a citizen of Carroll Parish, the senti-

ment of the locality was intensely disloyal, and the evidence shows that he attended war meetings, not participating in a very responsible way; but attending in seeming accord, with the purpose and object of the meeting. Although he attended several of that kind of meetings, he may have been loyal, and the fact that he was there, in seeming accord, with the purpose of the meeting, is simply competent as tending to prove his disloyalty.

23 His birth, education and environment, tend to prove his attachment to the southern cause; and while he was opposed to the alleged right, and disbelieved in the expediency of secession, he was devoted to the perpetuation of slavery, and persisted in that devotion, until the successful result of the war on the part of the federal government, established emancipation as an accomplished fact.

We do not wished to be understood, as holding that his failure to recognize emancipation, as declared by the proclamation, is material evidence upon question of loyalty, it only tends to show, situated as he was, his adherence to the one side or the other. At the time his slaves were removed from the Three Bayou place, or shortly thereafter, the federal power was identified in the prosecution of the war, with the enforcement and success of the policy of emancipation, the confederate power, was on the other hand identified with the enforcement and success of the policy of slavery. On the approach of the federal army, on the first of January, 1863, to the domicil of the claimant, he voluntarily by his agent, abandoned his home, with his slaves, because of such approach, and continued to be identified with the confederate cause, until in June 1865, when all hope had vanished of its success. While this act is not conclusive, as to his legal status, it tends in a marked degree, to show his sympathies, as between the contending forces. He was struggling to maintain his legal right to his slaves, and having voluntarily continued his domicile within the territory of the power devoted to the maintenance of that right, it is logical to assume, that he was in accord with the policy of that power, and anxious for its success. At that time, the south was seeking to preserve intact the condition of slavery as a means of confederate success, while the Government sought to disturb and destroy that condition, as a means of federal ascendency in the confederate states. Whether the slave was to be on one side, or the other of the belligerent line of the armies was a question of stragetic importance as shown by the report of the Secretary of War, made in Dec. 1861, as follows:

It is already a grave question what shall be done with those slaves who were abandoned by their owners on the advance of our troops into Southern territory as at Beaufort district in South Carolina. The number left within our control at that point is very considerable, and similar cases will probably occur. What shall be done with them? Can we afford to send them forward to their masters to be by them armed against us or used in producing supplies to sustain the rebellion? Their labor may be useful to us; withheld from the enemy it lessens his military resources; and with-

holding them has no tendency to induce the horrors of insurrection, even in the rebel communities. They constitute a military resource; and, being such, that they should not be turned over to the enemy is too plain to discuss. Why deprive him of supplies by a blockade and voluntarily give him men to produce them?

The disposition to be made of the slaves of rebels after the close of the war can be safely left to the wisdom and patriotism of Congress. The Representatives of the people will unquestionably secure to the loyal slaveholders every right to which they are entitled under the Constitution of the country.

By the acquiescence of Austin, in the removal of his slaves, from the Three Bayou place, and his continued residence thereafter, within the territory, subject to the actual jurisdiction and control of confederate power, he afforded an opportunity, to the confederate belligerents, to use and appropriate the services of his slaves, in the prosecution of the war against the forces and authority of the United States.

He not only sought to keep himself with his slaves within the lines of the confederate army, but he voluntarily selected the
24 town Shreveport, in the State of Louisiana, which at the time, was a stronghold of the enemies of the United States, and where his slaves, were subjected to the performance of labor, connected with the military operations of the confederate government. The facts found show, that while at said place in the year 1863 or 1864, he permitted, or authorized his slaves, to hire the teams with which they were entrusted, and persons having contracts, for the delivery of wood, to the confederate authorities, hired those teams from the slaves, and they were used, with the slaves as drivers, in the delivery of wood to the confederate arsenal.

The slaves were impressed by the confederate authorities, and made to work in the construction of gun-boats, which were being built, at that place, for the use of the confederate army. It does not appear that the decedent hired his slaves to work on the gun-boats, but that was unnecessary, for the purposes of the military service, as the confederate authorities exercised the power, of subjecting private property, and individual interest, to the public necessity.

When Austin located at the town of Shreveport, he is presumed to have known its character, as a depot of supplies, a place, where the confederate government was engaged in the construction of a naval armament; and the impressment of his slaves was one of the necessary results of his location at that point. Persons are always to be held responsible, for the natural and necessary consequence of their acts, and punishments of the severest nature are inflicted as a result of that legal intendment.

It does not appear, that he made any effort to remove his slaves, so that they might not be subject to impressment; but on the contrary, after having taken a portion of them to the State of Texas, they were brought back, and again subjected to the impressment and power, of the confederate authorities at Shreveport, and used as laborers in the construction of gun-boats.

In connection with these facts, it is pertinent for us to inquire, whether within the meaning of the law not only our jurisdiction, but all law applicable to the question of loyalty, the decedent "gave any aid or comfort to the late rebellion." This court has held at the present time in the case of Watson *vs.* The United States (25, C. Cls.):

It is the duty of the plaintiff to establish his loyalty affirmatively by competent evidence, of sufficient weight to overcome the presumption of disloyalty arising from his residence and environment. This would be so in any event without statutory provision, but in addition there is an express direction to the same effect found in section 1074 of the Revised Statutes, which provides:—

"SEC. 1074. Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant asserting the loyalty of any such person to the United States during such rebellion shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, shall be prima facie evidence that such person did give aid and comfort to said rebellion and to the persons engaged therein."

This statute requires consistent adherence to the United States, and the Bowman Act requires loyalty "throughout the war;" that is, the plaintiff must never at any time during the entire war have failed in his allegiance to the United States. Under these statutes it is not sufficient that plaintiff was at the beginning or at the end of the war favorably disposed towards the United States. The loyalty and adherence must have been continuous throughout the war, without any interruption at any time, and any one act giving "aid or comfort to persons engaged in said rebellion" will negative a contention in favor of plaintiff's loyalty "throughout the war."

This statute (Sect. 1074) was passed long before the so-called
25 Bowman Act, under which the case at bar was transmitted here, but it is none the less controlling as declaratory of the law and as giving the interpretation of the word "loyalty" when that word is found in subsequent acts of Congress.

In the inception of the war, and up to the time the decedent left the Three Bayou place, his residence within the territory where the "rebel force or organization held sway" as expressed in the statute, may have been involuntary, but when he fled, from the approach of the federal army, and kept himself with his family and slaves, within the confederate lines, his residence became voluntary, within the meaning of the statute, and such voluntary residence, is *prima-facie* evidence, that he gave aid and comfort to the persons engaged in war with the United States.

This statute required him to adhere to the United States upon his first opportunity, and if he failed to do that, he must be held responsible for the legal consequence of such failure.

He not only did not adhere to the United States; but upon the contrary, he kept within the Confederate lines, with his person, family and property, and whatever benefit could arise from that act of the decedent, it inured to the advantage of those in hostility to the United States, and to that extent, gave aid and comfort, to those engaged in war with the defendants.

In view of the facts, disclosed by the findings, in the application of what we regard as the settled principles of law, we hold that it is not shown, to the satisfaction of the court: that Sterlin T. Austin was, throughout the war, loyal to the Government of the United States.

Inasmuch as we have found, the decedent disloyal, and have by the theory of this opinion, regarded disloyalty as a qualification or restriction upon the jurisdiction of the court, technically our duty terminates with the finding of that issue for the defendants. But for the purposes of the present trial, we have made a finding on the question of fact, whether the decedent was the owner of cotton, and whether the same was seized, and sold by the United States. In the investigation of those questions, we are confronted, by one of the most voluminous record of testimony ever submitted to the court. A record, abounding in almost infinite contradictions of witnesses, and improbable statements of conditions.

That Sterling T. Austin in his lifetime, labored under a serious embarrassment in his own judgment, in the prosecution of this claim, must be apparent, to any one who dispassionately reads, and considers the facts and circumstances of this case. To him, there must have been one of two conditions, either, he was not able to establish his loyalty, under the captured and abandoned property act, or the claim which is now made, for the large amount of cotton, amounting to more than three times the value of his entire property in 1861, is a mistake, and fabrication. This Court was open to him, until August 20th, 1868; ready to adjudicate the claim, in the freshness of the memory of witnesses, then living, and able to testify with absolute certainty. If cotton was taken from him from the Three Bayou place as alleged, he must have known where it had gone; as it is claimed he had an interview with the officer, who was making a raid, for the purpose of collecting cotton in the vicinity of his plantation.

From the facts and circumstances, indicated by the proof, we conclude that the decedent, was embarrassed by his inability to
26 establish in this Court his adherence to the United States, as required by law; and from that embarrassment originates his failure, to prosecute the case within this jurisdiction. The claim in the contention of plaintiff, is now limited to five seizures, to wit, at the Three Bayou place, Shreveport, Rush County, Texas, Millican, and Galveston. Nearly one-half of the claim as now prosecuted, is based on the seizure at Three Bayou place,. It is impracticable in our opinion to discuss in detail all the evidence tending to induce a conclusion of fact, we can only deal in general results. So abundant is the testimony, on either side of the case, and so contradictory is the

statement of witnesses, that both parties have been able in the trial, to assert the boldest propositions of fact, as to the claim, and the defence.

The briefs and arguments of counsel for the plaintiff, insist that a very large amount of cotton was taken from the Three Bayou place, while the counsel for the defendants, argue from their standpoint, that but a few bales were taken, if any. If we exclude from our consideration, the testimony of the colored witnesses (which it is insisted was influenced by the agent of the United States) the unsuspected, unimpeached evidence, leaves the matter in grave doubt, as to how much cotton was raised in the seasons of 1861, and 1862,. If we take some of the witnesses, for the claimant and believe them, there is no trouble in finding that between seven and eight hundred bales were raised in the two years preceding the seizure, and upon the other hand if we take the testimony of the witnesses for the defense (those not involved in the alleged intimidation of the agent of the government) we can readily find that but very little cotton was raised in 1861, and 1862.

Counsel can prepare briefs, founded upon extreme views of the construction of testimony; but Courts must predicate judgments upon the reasonable probability of the truth of a case, and reconcile the evidence if possible. In the determination of the question, of the probable amount of cotton, raised before 1863, the Court has considered the condition, of the Three Bayou place at the time Austin took possession of it, the force both of men and teams which he had the first season, the character of the year 1862 with reference to overflow; and the very conflicting testimony of the different witnesses, who have made an examination of the plantation since the commencement of this suit, for the purpose of determining by an inspection of the ground, the amount in cultivation before the abandonment of the premises, and the testimony of witnesses who swear to the seizure and the amount of cotton on the plantation.

While there is a great conflict in the testimony as to the extent and duration of the overflow of 1862, it is very clear, from the evidence that it was a very wet season and the water materially diminished the product of the land for that year. The condition of the place, at the time it was taken possession of in April, 1862, is a very material in determining the result of that year's crop. There is upon this point, a great conflict between the witnesses offered upon the part of the plaintiff, and if we were to take the testimony of one of her witnesses we should be compelled to find that the first year there was between two and three hundred acres in cultivation. That witness is not only contradicted by the other testimony in the case, but he is to some extent impeached. The best and most valuable indication as to the condition of the land, in the year 1861, is to be found in the testimony of the brother of the decedent who was on the plantation from about the 18th of April 1861, to the 10th of May, and if he is not mistaken, the other witnesses who testify as to the three hundred acres being in cultivation in the year 1861, are badly mistaken.

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It is not necessary to descend into detail, as we have most carefully considered all the testimony in relation to the condition of the plantation in the years 1861, and 1862, the force used in the cultivation the first year of the occupation of the premises; the necessity for raising other crops besides cotton, and other testimony and have determined as the result of that consideration that there could not have been more than 250 bales raised during those two years. The amount raised of course limits the amount seized by the officers of the defendants. The next seizures in the order of prosecution are the seizures at Shreveport and in Rush County.

As to the seizure at Shreveport, there is a sharp conflict of testimony. The witness who swears to hauling the cotton, from where it was stored, is flatly contradicted by the testimony of the agent of the Government, at whose instance he swears he hauled it. Then as to the seizure in Rush County, a very serious doubt arises as to the ownership of that cotton, growing out of the act of the decedent, with reference to that question. But the serious difficulty, attending the prosecution of the claim for the Shreveport and Rush County cotton, grows out of the unsatisfactory proof, as to whether the United States, sold and realized on that cotton (if it was taken) within the meaning of the statute, fixing the liability of the defendants.

The last seizures alleged to have been made, by the agent of the United States, were at the town of Millican and city of Galveston in the summer and autumn of 1865 which seizures are embraced in exhibits A, B, and C, in the testimony of Elias S. Fletcher, who at the time of the seizure, was a commission merchant, doing business at both of said places. The amount embraced in those seizures, belonging to Austin, as claimed, is 256 bales, 72 bales of which he owned as a partner, with Fletcher, Bros and the balance in his own right. It is alleged that C. B. Alexander acting as Treasury agent made the seizures; that the cotton was sent to New York and sold, and the proceds realized by the United States, within the meaning of the law, giving the claimant a right of action. It would require, a detailed process of statement, and reasoning, to go through all the testimony, bearing upon the question, as to whether all, or any of these seizures were made as alleged by the plaintiff. The 144 bales embraced in exhibit A was the joint property of Fletcher Bros, and Austin. Fletcher Bros, at the time of the seizures, were interested with Alexander, in the collection and seizure of other cotton, under a contract, which he had with the Treasury Department; and if this seizure was made, we have the strange contradiction of one partner seizing the property of his copartner, and confiscating it to the benefit of the Government of the United States. Besides, the seizure in this transaction, was as to nearly all the cotton, after the responsible connection between Alexander and the defendants had ceased. The claim of the plaintiff as to the seizure in the State of Texas depends upon the testimony of E. S. Fletcher, and if he were disbelieved, in all his testimony, no right of recovery could be maintained upon other portions of the proof. It is conceded, that he is

the only witness, as to the taking of the property, and that as to a portion of the cotton, he has in two proceedings, testified that it was used in paying expenses, and did not go into the Treasury of the United States. That however, is explained to the satisfaction of the Court. We have carefully considered the testimony, in regard to the different seizures in the State of Texas, and applying the principle, that the burden of proof, rests on the plaintiff, we disallow Exhibits A and B, and allow C, making 110 bales. We find the proceeds of all the cotton seized $59,287. Having found that the decedent was not "through out the war loyal to the Government of the United States" it is the judgment of the Court that the petition be dismissed.

28 V.—*Judgment of the Court.*

FLORINE A. AUSTIN, Administratrix of Sterling T. Austin, deceased,
vs.
THE UNITED STATES. } No. 13,843.

At a Court of Claims held in the City of Washington on the 9th day of June A. D. 1890, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the Claimant, Florine A. Austin, administratrix of Sterling T. Austin, dec'd, be dismissed.

BY THE COURT.

29 VI.—*Application of Claimant for and Allowance of Appeal.*

December Term 1889–1890.

FLORINE A. AUSTIN, Administratrix of Sterling T. Austin, deceased,
vs.
THE UNITED STATES. } No. 13,843.

From the judgment rendered in the above-entitled cause on June 9, 1890, in favor of the defendants, the Claimant by her Attorneys, on the second day of September, 1890, makes application for, and gives notice of an appeal to the Supreme Court of the United States.

SHELLABARGER AND WILSON,
JOHN C. FAY,
Attorneys for Claimant.

Filed September 2, 1890.

Allowed September 2d, 1890, during the vacation of the Court.

WILLIAM A. RICHARDSON,
Chief Justice.

30 In the Court of Claims.

FLORINE A. AUSTIN, Administratrix of Sterling T. Austin, deceased,
vs.
THE UNITED STATES.
} No. 13,843.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of the claimant for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington, this 14th day of October, A. D. 1890.

JOHN RANDOLPH,
[SEAL.] *Ass't Clerk of the Court of Claims.*

Endorsed on cover: Case No. 14,282. Court of Claims. No. 259. Florine A. Austin, administratrix of Sterling T. Austin, deceased, appellant, *vs.* The United States. Filed October 14, 1890.

Supreme Court of the United States.

OCTOBER TERM, 1893.

FLORINE A. AUSTIN, ADMINISTRATRIX,

v.

THE UNITED STATES.

No. 259.

Brief for the Appellant.

STATEMENT.

This was an action brought in the Court of Claims under the provisions of an act of Congress approved March 3, 1883, set out in full (R. p. 1), referring the claims of the successors in interest and legal representatives of Sterling T. Austin, for cotton taken during the war, to the Court of Claims to adjust and settle and to render judgment for the net proceeds, removing the bar of any statute of limitation, and providing that it shall be shown to the satisfaction of the court that neither Austin nor his surviving representatives gave aid or comfort to the rebellion, but were throughout the war loyal to the United States.

The court adjusted the claims and found that the net proceeds of the cotton seized by the United States was $59,287 (Finding VIII, R. p. 7).

It also finds a series of facts (Findings I to VII, R. pp. 4–7) from which it deduces the conclusion (Finding IX, R. p. 7) that the court is *not* satisfied that Sterling T. Austin *did not* give aid and comfort to the rebellion and is not satisfied that he was loyal throughout the war to the United States.

It also finds that the surviving representatives—*i. e.*, the beneficiaries under this act—did not give any aid or comfort to the rebellion, but were loyal.

From these facts, the court dismisses the petition and from this judgment this appeal is prosecuted.

Assignment of Errors.

1. The court erred in not giving to the amnesty proclamations the effect of proof of loyalty required by the act of March 3, 1883, referring the case to the Court of Claims.

2. The court erred in deducing the fact of disloyalty from the facts set forth in the several findings on that subject.

First.

The main question to be here presented is: Do the amnesty proclamations of the President of July 4, 1868, or December 25, 1868, furnish the evidence that is required by the act of March 3, 1883, that Sterling T. Austin gave no aid or comfort to the late rebellion, but was throughout the war loyal to the Government of the United States?

We maintain that such proclamations furnish conclusive evidence, which the United States are not at liberty to controvert. If this be so it is immaterial as to what the actual fact might have been, the *legal fact* prevails. We further maintain that Congress would have no power to attach the

proviso in question to this act except upon this construction of it.

That to give it such construction as was accorded it in the Court of Claims would be to render it unconstitutional and void, and we rely upon the very familiar doctrine that where one construction of an act would render it unconstitutional and another clearly constitutional, the latter must prevail.

The decisions of this court have been so comprehensive and full upon the subjects of amnesty and pardon that it would seem that there could be left no doubt as to the general principles applicable to the case at bar, and there would seem to be no room for discussion as to the error of the court below in failing to give effect to "amnesty," but for the effort of that court to assign a "special status" to this cause so as to take it out of the operation of the otherwise the universal rule.

We insist that the special act is in *pari materia* with the captured and abandoned property act (March 12, 1863) and should receive the same construction as that act has received by this court. Its language is identical and we fail to perceive any force in the claim that what is not within the power of Congress to do under a general act may be done under a special one.

The Adjudications Under These Statutes.

One of the earliest cases in the Supreme Court, bringing into view the effect of *amnesty*, is in 4th Wallace, in the case *Ex parte Garland* (p. 333).

The question, in that case, arose under the provisions of the act of Congress, of January 24, 1865, prohibiting attorneys from practicing in the courts of the United States, unless they took the oath prescribed by the act of July 2,

1862, commonly known as "the iron-clad oath," swearing that they had never engaged in the rebellion, &c.

Amongst other questions passed upon by the court in that case was the question as to what effect the pardon of the President had on the rights of attorneys; and the court held, that the President's pardoning power extended to every offense known to the law, might be exercised at any time after the commission of the offense, either before or after legal proceedings in prosecution of the offense, *and that that power is not subject to legislative control.*

The court further held that the pardon reaches the punishment prescribed for the offense and the guilt of the offender. If granted before conviction it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights. *It gives him a new credit and capacity.* There is only this limitation to its operation: it does not restore offices forfeited, or property, or interests vested in others in consequence of the conviction and judgment.

The court further held that the petitioner in this case, having received a full pardon for all offenses committed by his participation, direct or implied, in the rebellion, is relieved from all penalties and disabilities attached to the offense of treason, committed by such participation. For that offense he is beyond the reach of punishment of any kind. He cannot, therefore, be excluded by reason of that offense from continuing in the enjoyment of a previously-acquired right to appear as an attorney and counsellor in the Federal courts.

In the body of the opinion, the court uses the following language:

"A pardon reaches both the punishment prescribed for

the offense and the guilt of the offender; and when the pardon is full, *it releases the punishment and blots out of existence the guilt, so that, in the eye of the law, the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching;* if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

Another case where this question of the effect of pardon came before the Supreme Court, was in one of the first cotton cases, tending to the defeat of the loyalty clauses in acts giving jurisdiction to this court, namely, the case of the United States *v.* Padelford (9 Wall. 531).

What the court there held was that, although the claimant had given aid to the rebellion, by becoming party to certain official bonds to persons acting as quartermasters in the rebel army, yet, having been pardoned, his offense, in executing the bonds, cannot be imputed to him, and that he was entitled to the net proceeds, as given to the loyal owners, under the captured and abandoned property act.

On page 543 (9 Wall.) the court is brought to the exact question now before this court, provided there is no difference between a general statute and a special one, in this regard.

The court states the contention of the Government, in that case, in these words:

"But it has been suggested that property was captured in fact, if not lawfully, and that the proceeds having *been paid into the Treasury of the United States, the petitioner is without remedy in the Court of Claims, unless proof is made that he gave no aid or comfort to the rebellion. The suggestion is ingenious, but we do not think it sound.* The sufficient answer to it is, that after the pardon no of-

fense connected with the rebellion can be imputed to him. If, in other respects, the petitioner made the proofs which, under the act, entitled him to a decree for the proceeds of his property, *the law makes the proof of pardon a complete substitution for proof that he gave no aid and comfort to the rebellion.* A different construction would, as seems to us, defeat the manifest intent of the proclamation of Congress which authorized it. Under the proclamation and the act, the Government is a trustee, holding the proceeds of the petitioner's property for his benefit, and having been fully reimbursed for all expenses incurred in that character, loses nothing by the judgment which simply awards to the petitioner what is his own."

In the Klein Case (13 Wallace, 128), decided in 1871, the claim was asserted under the Captured and Abandoned Property Act, and the chief justice, at the commencement of his opinion, states that the question in the case was, whether an act of Congress, of July 12, 1870 (the Drake amendment), debars the defendant in error from recovering, as administrator of Wilson.

The court held that it did not, notwithstanding the proof of loyalty required by section three of the Captured and Abandoned Property Act, and by the twelfth section of the act above named, amendatory of the Court of Claims Act, and by this Drake amendment.

The court held that the title to the property was never divested from the owner (p. 142); that it was for the Government to determine whether they should be restored to the owner (p. 142); that the restoration of property rights, promised in the amnesty, decides the question affirmatively, as to the restoration of the property (p. 142); that the restoration of the property became the absolute right of the persons pardoned, on application within two years of the close of the war; that this promise of restoration was based upon an equivalent. Pardon and restoration of political rights were in return for the oath and its fulfillment.

On page 143, the court alludes to its judgment in the Padelford case, rendered April 13, 1870, affirming the judgment of the Court of Claims in favor of the claimant; and the court remarks that, soon afterwards, the Drake amendment was introduced as a proviso in an appropriation bill.

Then regarding the proviso, it uses the following words (Klein case, 13 Wall. 143):

"This proviso declares, in substance, that *no pardon, acceptance, oath, or other act, performed in pursuance, or as a condition of pardon, shall be admissible in evidence in support of any claim against the United States in the Court of Claims*, or to establish the right of any claimant to bring suit in that court, nor, if already put in evidence, shall be used.

* * * * * * * * * *

"*Proof of loyalty is required to be made according to the provisions of certain statutes, irrespective of any Executive proclamation, pardon, or amnesty, or act of oblivion; and when judgment has been already rendered on other proof of loyalty, the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall* DISMISS THE SAME FOR WANT OF JURISDICTION."

Then, on page 144 (13 Wall.), the court states, and answers, one of the contentions of the Government in that case. It says:

"It was urged in argument that the right to sue the Government in the Court of Claims is *a matter of favor;* but this seems not entirely accurate. It is as much the duty of the Government as of individuals to fulfill its obligations. Before the establishment of the Court of Claims, claimants could only be heard by Congress. That court was established in 1855, for the triple purpose of relieving Congress, and of protecting the Government by regular investigations, and of benefiting the claimants by affording them a certain

mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States. *Originally it was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress.*

In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for Congress, it was authorized to *render final judgment*, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay each claimant. This court being of opinion that the *provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision* (found 14 Stats. 9); *since then the Court of Claims has exercised all the functions of a court*, and this court has taken full jurisdiction on appeal. The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the Government and the citizen, from which appeal regularly lies to this court."

Then, on page 145, the court says:

"But the language of the provision shows plainly that it does not intend to withhold appellate jurisdiction, *except as a means to an end.* Its great and controlling purpose is to *deny to pardons*, granted by the President, *the effect which this court had adjudged them to have.* The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was *our duty to consider them*, and give them effect in cases like the present, as equivalent to proof of loyalty.

In Knote's case (95 U. S. 149–153), this doctrine is repeated, in the opinion by Field, J., in these words:

"The effect of a pardon upon the condition and rights of its recipient have been the subject of frequent con-

sideration by this court, and principles have been *settled* which will solve the question presented for our determination in the case at bar. (*Ex parte* Garland, 4 Wall. 333; Armstrong's Foundery, 6 *id.* 766; U. S. *v.* Padelford, 9 *id.* 531; U. S. *v.* Klein, 13 *id.* 128; Armstrong *v.* U. S., *id.* 155; Pargoud *v.* U. S., *id.* 156; Carlisle *v.* U. S., 16 *id.* 147; Osborn *v.* U. S., 91 U. S. 474.) A pardon is an act of grace by which an offender is *released from the consequences* of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law it *so far blots out the offense that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position.*"

In Carlisle's Case (16 Wall. 147–151), the suit was under the Captured and Abandoned Property Act; claimants were subjects of Great Britain; had been guilty of disloyalty in manufacturing saltpetre in Alabama, and selling it to the Confederates, &c.

In this case the claimants recovered, notwithstanding their disloyalty; and, amongst other things laid down in this case, are the following:

First. That the proclamation of universal amnesty and pardon of December 25, 1868, *was a public act*, of which the courts of the United States were *bound to take notice*, and to which all courts were bound to give effect; in this reaffirming the Armstrong Case (13 Wall. 154).

Second. The court held again, following and quoting the Armstrong Case, that the court *would not even consider the question whether the claimant gave aid and comfort to the rebellion, because said amnesty proclamation "entitled her to the proceeds of the captured and abandoned property in*

the Treasury without proof that she never gave such aid and comfort.

Third. That it was *beyond the power of Congress to limit, qualify, or impair the legal effect attached by the Constitution to the amnesty;* that the amnesty, being general and unconditional, no conditions can be attached to its operation, or it be thereby impaired.

In this the court followed and quoted the Klein Case (13 Wall. 128).

This vital doctrine of the limitation of the power of Congress over the separate co-ordinate and independent powers of the judiciary is thus affirmed in the leading case of Murray's Lessee *v.* Hoboken (18 How. 285):

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

Fourth. That whilst there had been a difference of opinion amongst judges as to the cases to which amnesty applied, there was yet no difference of opinion between the judges as to the effect and operation of the pardon in a case where it applies. All the judges have agreed that the pardon not merely releases the offender from the punishment prescribed for the offense, but that it obliterates, in legal contemplation, the offense itself.

Fifth. That the amnesty granted relieved the claimants from the legal consequences of their participation in the rebellion, and from the *necessity of proving* that they had not thus participated, which otherwise would have been indispensable to a recovery; the court remarking that, although

"it is true the pardon and amnesty do not and cannot alter the actual fact that aid and comfort were given by the claimants, but they forthwith *close the eyes of the court to the perception of that fact as an element in its judgment, no rights of third persons having intervened.*"

These cases having been referred to, not merely for the purpose of showing, generally, the effect and scope of Presidential pardon, but for the purpose of establishing the proposition that in case where the matter of loyalty, on the one hand, and pardon, on the other, are made material, there *no strength of language employed in acts of Congress, no manner of ingenuity or device as to the structure and form of the act, such as making the proof of loyalty a condition precedent to taking jurisdiction, or to the right of recovery, or to both, has any effect in the way of depriving the amnesty of its constitutional effect as working absolute and complete oblivion; as being, to use the words of the Supreme Court, a "substitute" for actual proof of loyalty; as being, considered as evidence, positive proof of loyalty, and as being a kind of proof not necessary to be presented, but which every court is obliged to take notice of, where the effect of the amnesty is made material.*

Judgments Proper, or Common-Law Judgments.

Another consideration it is proper here to present, namely, that it is within the power of Congress, by a special private act, to authorize, as between individuals, as well as between the Government and individuals, jurisdictions in the courts of the United States to try and adjudicate cases, and to render common-law judgments, which shall be final and incapable of review by Congress, as explained in Klein's Case (13 Wall. 144, 145; 2 Wall. 561).

The case of Gordon, in 2 Wall. 561, is the one wherein

the opinion of the Chief Justice, Taney, as agreed upon by the judges as that of the court, was lost, and never published until it was found, in Appendix to 117 U. S., 698 *et seq.*, where the opinion is published in full.

The case is a vital one, as applied to the case at bar, because it both defines what is a "judicial trial," as distinguished from an auditing one, and also decides that Congress cannot, in contravention of constitutional principles, direct any of the steps of such a judicial trial.

"The inferior court [says this opinion], therefore, from which the appeal is taken, *must be a judicial tribunal*, authorized to render a judgment which will *bind* the rights of the parties litigating before it, unless appealed from, and upon which the appropriate process of execution may be issued by the court to carry it into effect. And Congress *cannot* extend the appellate power of this court beyond the limits prescribed by the Constitution, and *can neither confer*, nor impose on it, the authority or duty of hearing and determining *an appeal from a commissioner or auditor, or any other tribunal exercising only special powers under an act of Congress: nor can Congress authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect.*"

We have alluded to this case, and to 13 Wall. 144, 145, for the purpose of fixing in your attention the distinction between a final common-law judgment which is conclusive as against all officers and Departments of the Government, and against review by Congress is precluded, and those which are in the nature of auditing reports.

In *Ex parte* Vigo (21 Wall. 648–650) this doctrine is repeated, and the Supreme Court held that, under the terms of the special act in that case (see pp. 650, 651), a "judicial determination" was contemplated, and, hence, an appeal to

the Supreme Court was allowed. And, at middle of page 650, the court holds that when *such* a judgment is authorized, *whether by general or special law, an appeal lies.*

The head note to the report reads as follows:

"When a claim on the Government, not capable of being otherwise prosecuted, is referred, *by special act* of Congress, to the Court of Claims, *acting judicially in its determination*, a right of appeal to this court, in the absence of provision to the contrary, is given by the act of June 25, 1868, (section 8707, Revised Statutes). That act gives to the United States the right of appeal from the adverse judgment of the said court, in all cases where it is *required by any general or special law to take jurisdiction of a claim made against the United States, and act judicially in its determination.*"

HART *v.* U. S., 118 U. S. 62; ALSO, 16 COURT OF CLAIMS, 459.

We now turn to some special notice of Hart's Case.

It may be claimed that, because the Supreme Court in this case held that, although the claimant had received from the President, pardon for all the offenses committed by him arising from participation, direct or implied, in the rebellion, and such pardon did not authorize the payment of the claim, in contravention of the joint resolution of March 2, 1867 (14 Stats. 571), now embodied in section 3480 of the Revised Statutes, therefore, this is in conflict with our position.

If such contention is made, it is plainly untenable. What the Court of Claims decided and the Supreme Court affirmed (so far as relates to the present case) may be best stated by quoting from 16 Court of Claims R. 486, from the opinion of Justice Davis, who states what we quote below, he speaking of the effect of the joint resolution of March 2, 1867 (sec. 3480 of the Rev. Stats.). That joint resolution is as follows:

"It shall be unlawful for any officer to pay any account, claim, or demand, against the United States, which accrued or existed prior to the 13th day of April, A. D. 1861, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion; or in favor of any person who, during said rebellion, was not known to be opposed thereto, and distinctly in favor of its suppression, and no pardon heretofore granted, or hereafter to be granted, shall authorize the payment of such account, claim, or demand, until this resolution is modified or repealed."

What he says about the effect of this resolution is in these words (16 Court of Claims, bottom page 484, *et seq.*):

"As soon as the fact is ascertained that the claim is within the prohibition of the resolution of 1867 (sec. 3480, Rev. Stats.), the court must say that, being a claim which the Executive was *forbidden to pay, its reference does not confer jurisdiction to proceed with it to final judgment.* With this modification, induced by the recent argument, we repeat the former expression of our views:

"That would be making the Treasury do indirectly what Congress has said it cannot do directly. Were we to render judgment in the claimant's favor on such claims, we should invite the officers of the Treasury to do an act, under cover of our judgment, which Congress plainly intended that they should not have authority to do in any contingency. We are not required to determine, whether we should be authorized to render judgment against the Government on this class of claims, if the claimant had appeared here on his own motion. We confine ourselves to this: *that when the head of an executive department is forbidden, by law, to pay a claim, there can arise no disputed fact, no controverted questions of law, nothing in which our decision can affect a class.*"

Again, on page 486, the court says:

"And even if we could" (travel beyond the Secretary's letter referring the case to this court), "we are all of opinion,

as we have already stated, that our jurisdiction, when we ascertain that a law, enacted within the constitutional power of Congress, forbids payment of the claim by the Executive transmitting it. We cannot then proceed to give a judgment which may secure payment of the claim, in violation of the act, nor on the other hand, a judgment which will bar the claimant when the act is repealed."

Again, middle page 484:

"Congress having, in the exercise of a clear constitutional right, provided that claimants, like Hart, should not be paid from general appropriations for claims that accrued prior to April 13, 1861, *the Executive was powerless to consider such claims. Auditing and accounting are but parts of a scheme for payment; and, in our opinion, the arrest of the object was the arrest of the means for obtaining it.*"

The syllabus states in these words:

"The joint resolution, March 2, 1867 (Rev. Stats., sec. 3480), which prohibits officers of the Government from paying claims that accrued prior to April 13, 1861, in favor of persons who promoted or encouraged the rebellion, in effect *prohibits the heads of Departments from transmitting them to this court under the act of June* 25, 1868 (*Rev. Stats., sec.* 1063).

In brief, and in other words, you held that the effect of sec. 3480, Rev. Stats., was to cut off and prohibit claims accruing prior to April 13, 1861, from being in any form or manner prosecuted in the Court of Claims.

This the Supreme Court of the United States in every particular approved, expressing its approval substantially in the language of this court. The language of the court is (Hart *v.* United States, 118 U. S. 67):

"*If the joint resolution had said nothing on the subject of a pardon, no pardon could have had the effect to au-*

thorize the payment out of a general appropriation of a debt which a law of Congress had said should not be paid out of it. The pardon cannot have such effect ascribed to it merely because the joint resolution says that it shall not have such effect."

What, then, takes this case out of the operation of the settled law and denies to this appellant the benefit of the proof of amnesty as a fulfillment of the proviso of this special act?

It is claimed that as the act is a gratuity Congress may affix conditions to the bestowal of its bounty and that the Congress intended that actual, as distinguished from legal, loyalty was what was required, and as no right of the claimant was affected thereby the provisio, as now construed, was perfectly competent.

The vice of this contention originates in the premises from which the conclusion is sought to be reached. It is stated that the capacity of the intestate to sue did not arise till December 25, 1868, and that as the policy of the act of March 12, 1863, terminated two years after the close of the Rebellion (p. 13), August 20, 1868, "the Government ceased to hold such property as trustee, and the same passed to the control and legal ownership of the Government as captured property, unaffected by any legal or equitable rights in favor of the original owner." If there was any force in these suggestions as to dates, the fact of the amnesty proclamation of July 4, 1868, which included Austin, having been 47 days before the expiration of the captured and abandoned property act, would be a complete answer, for then, on July 4, 1868, Austin was a loyal man and the United States held this property, at least, until August 20, 1868, as his trustee according to the reasoning of the court below, and he had a vested right which would have been affected by the proviso of this statute.

But the whole argument is, in our judgment, fallacious, and in part grows out of the failure to discriminate between a right and a remedy; that the former may, and often does, exist without the latter is a proposition too well settled to need discussion.

The property in controversy was taken and sold under the provisions of the act of March 12, 1863, and by virtue of that act alone. Whether under the rules of civilized warfare it could have been taken or not it is needless to inquire; it was not so taken; it was taken by the United States as trustee for the owners. As to the loyal owners, provision was made, to wit, to pay them the net proceeds; as to disloyal owners, its disposition was in abeyance. But the title to it was not divested by the taking; it did not by virtue of anything in the act become the property of the United States, but remained the property of the original owner. This doctrine is fully and elaborately set forth in the opinion in the *Klein case*, cited *supra*.

The same argument advanced here was advanced in Padelford's case, to wit, that the proceeds having been paid into the Treasury, the claimant was without remedy in the Court of Claims except upon proof of loyalty; but the court answers this by saying, "This suggestion is ingenious, but we do not think it sound," and in the Klein case, where the suggestion was that a suit against the Government was a matter of favor, the court says: "It was urged in argument that the right to sue the Government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the Government as of the individuals to fulfill its obligations."

Another contention is that resort may be had to the report of the Senate committee to ascertain in what sense the words of the proviso were used (R. p. 15), and certain expressions in that report are held to fix the sense in which they were employed.

A resort to such a source for the construction of a statute is, we hold, not permissible.

In District of Columbia *v.* The Washington Market Co. (108 U. S. 253), it was strenuously contended that the act of March 3, 1873 (17 Stats. 540), and which authorized the Board of Public Works, if they thought best, "to make arrangements for securing sufficient land fronting on Pennsylvania avenue for the erection of suitable buildings for District offices," &c., might be interpreted in the light of, and with the aid of, declarations made by the authors of the law (see 108 U. S., top page 253).

This contention was made in order to fasten on the act of March 3, 1873, a purpose to *preserve in force the provisions of section* 14 *of the act of May* 20, 1870 (16 *Stats.* 124), *by which* 14*th section the Washington Market Company was required to pay, every year,* $25,000 *to Washington, for the support and relief of the poor of the city and District.*

In rejecting this right to resort to such evidence, the court, in its opinion (p. 254), by Matthews, J., says:

"*Nor are we willing to accept the debates that are reported as occurring in Congress at the time of the passage of the deficiency appropriation act of March* 3, 1873, *as evidence of the meaning of the clause on which the controversy in this case depends.*

"The question is whether, *according to its correct construction, that clause authorized the parties to execute the agreement into which they entered.*"

Endlich on Interpretation of Statutes, section 30, p. 41, says:

"But it is *unquestionably a rule that what may be called the parliamentary history of an enactment is 'wisely inadmissible' to explain its meaning.*"

Again, same page (Endlich, sec. 30, p. 41):

"In giving construction to a statute we cannot be controlled by the views expressed by a few members of the Legislature, who expressed verbal opinions on its passage. Those opinions may, or may not, have been entertained by the more than a hundred members who gave no such expression. The declarations of some, and the assumed acquiescence of others therein, cannot be adopted as a true interpretation of the statute. Indeed, the inference to be drawn from comparing the language of the act with the declared intention of its framers would be, that the difference between the two was not accidental, but intentional. The court is, therefore, not at liberty to recur to the views of individual members of the Legislature, in debate, to ascertain the meaning of a statute." (Citing District of Columbia *v.* Market Co., 108 U. S. 243; U. S. *v.* Union Pacific, 91 U. S. 72; Aldrich *v.* Williams, 3 How. 9; Cumberland Co. *v.* Boyd, 113 Pa. St. 52.)

But even if this were true and such a construction could be arrived at by its use, it would still not militate against our contention, for we insist that even though the words "that the court shall give no effect to proof of pardon or amnesty" had been inserted in the act, thus taking away any claimed ambiguity, such direction to a court in a judicial trial would, under the authorities heretofore cited, have been of no effect whatever; that the court acting judicially would have been obliged, as it was in the *Klein* case, to have overruled them.

When Congress passed this law, it knew perfectly well that the Supreme Court had settled the law to be that proof of "amnesty" was proof of continuous loyalty. Therefore, when Congress passed a law requiring proof of loyalty to be made, and making this requirement in substantially the same words as had been employed in the prior acts of Congress, in order to recovery (as, for example, in the 12th sec-

tion of the act of March 3, 1863, 12 Stats. 767, and in section 3 of the Abandoned and Captured Property Act of March 3, 1863, 12 Stats. 820, and the proviso contained in the act of March 12, 1870, 16 Stats. 335, being the Drake Amendment), it will be presumed that Congress meant to give to these words the signification which the final interpretation of the Supreme Court had placed upon them, namely, that "amnesty" was complete proof of loyalty, and that this proviso, therefore, was not designed, by Congress, to affix to this jurisdiction (authorizing a common-law judgment to be rendered) an unconstitutional proviso.

On the contrary, the presumption is that Congress used the language of this proviso in the only sense in which it could be constitutionally used when attached to a law, the body of which was giving jurisdiction to investigate and render a common-law and final judgment. (See cases cited in section 367 of Endlich, and cases in note 64, page 513. See also "The Abbottsford," 98 U. S. 440, 444. Also see McDonald *v.* Hovey, 110 U. S. R. 628 and 629.)

How strong the presumption is in favor of Congress having designed to use the language of this proviso in a constitutional, as distinguished from an unconstitutional sense, is established by abundant and controlling authority.

For example, in Township of Pine Grove *v.* Talcott, (19 Wall. 673), the court on this point says:

"It is an *axiom in American jurisprudence that a statute is not to be pronounced void upon this ground (of unconstitutionality) unless the repugnancy to the Constitution be clear and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. The particular clause of the Constitution must be specified and the act admit of no reasonable construction in harmony with its meaning. The judicial function involving such a result is one of delicacy, and to be exercised always with caution.*"

We conclude, therefore, that it is demonstrated by these cases that Congress did not mean to give this proviso a sense different from that previously affixed to it in other laws, and which would render it unconstitutional.

To this further see—

Twitchell *v.* Blodgett, 13 Mich. 127.
Taylor *v.* People, 8 Mich. 320.
People *v.* Mahany, 13 Mich. 482.

The same thing is found in—

Cooper *v.* Telfair, 4 Dall. 14.
Fletcher *v.* Peck, 6 Cranch, 87.
Ogden *v.* Saunders, 12 Wheat. 293.
Legal Tender Cases, 12 Wall. 531.
Livingstone County *v.* Darlington, 101 U. S. 410.

In this last case, of Livingstone County *v.* Darlington (101 U. S. 410), the court quotes from the opinion of Chief Justice Marshall, in Fletcher *v.* Peck, in 6 Cranch, 128, the following words:

"The question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which is seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be construed as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

And see the other cases cited in 110 U. S. 628 *et seq.*

SECOND.

This court below invites this court (R. p. 19) to determine

as matter of law whether the facts found justify the resultant fact of disloyalty in fact, and in their opinion group them together (R. p. 19).

It appears from the recital that Austin was born in South Carolina in 1815; moved to Georgia seven years later; that he there acquired a large property; was a man of thrift and energy, and at the breaking out of the war was married, had a family of a wife and three children, and owned 160 slaves; that he was opposed to secession, and was of the supporters of the Bell and Everett party in 1860. In 1861 he bought a plantation of 2,380 acres in Louisiana, whence he moved his family and slaves at the outbreak of the war.

Up to this point in the narrative certainly no evidence of aid and comfort to the rebellion can be deduced.

Arriving in Louisiana the findings show there was great excitement, public meetings in aid of enlistment, where violent and inflammatory speeches were made. Two such meetings were held in 1861 and 1862 within six and eight miles of his residence.

He was present at both, but said nothing, nor in any other manner did he assist in their purpose or object.

In 1862 slaveholders were called upon to subscribe slaves to aid the families of those in the Confederate service, and so great was the excitement then that it was unsafe for any one to refuse to comply. He does not appear to have subscribed, but a captain and guard came to his plantation, and he, after an interview with the captain, turned a slave over to him.

When the Federals advanced to his plantation his agent in charge moved his slaves back into the country eighteen or twenty miles He was absent in Georgia at the time.

From this point Austin took charge of them and moved them to Monroe, Shreveport, and San Antonio, Texas, where they were at the close of the war.

While at Shreveport some of the slaves were impressed, and worked on rebel fortifications and gunboats.

These are the substantial facts from which disloyalty is deduced as matter of fact.

Their detail shows how fully his career was hunted up, and the pregnant fact that in all this minute history not one affirmative fact is found, not one instance where one dollar was subscribed, one word spoken, one ounce of provender was contributed to the Southern cause, annihilates the conclusion drawn from the facts found. Why *impress* slaves, unless the owner is unwilling to hire them? Attending meetings in which he took no part simply informed him of the purposes of his neighbors moving his slaves to a place of safety was dictated alike by motives of humanity as well as interest. No one unequivocal fact is found which denotes disloyalty; each and all bear upon their face the absence of any intention to voluntarily give aid or comfort to the Southern cause.

The effort of Austin to save his crumbling fortune, to keep together the results of his industry and thrift until such time as hostilities should cease, and his failure to employ them in aid of the Confederacy, certainly does not tally with the conclusion drawn by the court below.

The appellant therefore insists that the judgment of the court below should be reversed and the cause remanded to enter judgment in favor of the appellant for the sum of $59,287, the net proceeds in the Treasury of the sales of appellant's cotton.

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IN THE

Supreme Court of the United States.

Term No. 259.

FLORINE A. AUSTIN, Administratrix of STERLING T. AUSTIN, deceased,

vs.

THE UNITED STATES.

ADDITIONAL BRIEF FOR APPELLANT.

By

SAMUEL SHELLABARGER,
J. M. WILSON, and
JOHN C. FAY.

McGILL & WALLACE, Law Printers, Washington, D. C.

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THE UNITED STATES.

No. 259.

ADDITIONAL BRIEF FOR APPELLANT.

Since the hearing of this case was postponed for hearing before a full bench, counsel for appellant decide to submit this additional Brief—this not because it adds any material views of the case not embraced in our first Brief, but because the additional time afforded us by the postponement has given opportunity for this attempt at a somewhat fuller consideration of the most important questions on which the case turns.

The Bowman Act is no Criterion for Construing Austin Act.

In deciding this case the court below, after quoting (*R., p. 6*) the special act under which the case is prosecuted (and which is found in *22 Stats., 804*), assumes, at the very outset of the opinion (*R., p. 9*) the entire question in the case in stating what is expressed in these words:

"The proviso makes it the duty of the court to determine, *as a preliminary question*, whether the decedent, or any of his surviving representatives, gave any aid or comfort to the late rebellion, or were loyal, throughout the war, to the Government of the United States. That inquiry confronts the court *at the threshold* of its investigation, *and must be determined antecedent to the consideration of any other branch of the case.* If Sterling T. Austin was not loyal during the late war, within the meaning of the law as it now exists, then it is wholly immaterial whether the cotton was seized or not. The power to adjudicate is limited by that inquiry."

The words of the special statute under which this suit is prosecuted—and as to which words the court here says that the question of loyalty is made to be, at the very threshold of the investigation, and that it must be determined "*antecedent*" to the consideration of any other branch of the case—are found at the bottom of page 8 and top of page 9 of the Record, and are as follows:

"And the same are hereby referred to the Court of Claims, with *full power and jurisdiction* in the said court to adjust and settle such claims, and *to render a judgment* in said cause for the full amount realized by the United States from the sale of such cotton as shall appear from the evidence to have been so taken by said authorities; *and in such action the said representatives shall be entitled to recover as aforesaid, any statute of limitation to the contrary notwithstanding:* Provided, however, *that it be shown to the satisfaction of the court that neither Sterling T. Austin, senior,* nor any of his surviving representatives, *gave any aid or comfort to the late rebellion, but were, throughout the war, loyal to the Government of the United States.*"

The court, therefore, makes (as does also the Government Brief at page 6) the concluding language of the Austin Act to be precisely identical, in its legal effect, with the language found in the fourth section of what is known as the "Bowman Act" (*22 Stats., 485–486*), and which is cited and relied on at the top of page 6 of the Govern-

ment's Brief for defeating the court's jurisdiction in the present case.

Since no jurisdiction to make a strictly judicial trial, and to render judgment, appealable to this court, is given by any portion of this Bowman Act, but on the contrary, the rendition of such a judgment is expressly prohibited in each of the sections 1, 2, 3, and 4 of said act, there is, for this reason, no appropriateness in the reliance, found in the Government's Brief, upon the provisions of this Bowman Act for the purpose of defeating the jurisdiction given in the Austin Act, provided this Austin Act contemplates, authorizes, and requires a strictly *judicial*—as distinguished from an auditing—trial, and requires the rendition of a final judgment, appealable to this court.

The auditing trials, conducted under the Bowman Act, may be prescribed for at every step thereof by the act of Congress creating the jurisdiction, and also the effect or consequences resulting, as between the Government and the claimant, may be prescribed by the act of Congress according to its unrestrained pleasure. Therefore, in each of these sections 1, 2, 3, and 4 of the Bowman Act, Congress has provided in express words in defining the jurisdiction under said Bowman Act, in cases brought for supplies or stores taken by or furnished to the Army or Navy during the rebellion, that the petition shall state that the claimant did not give aid or comfort to the rebellion, but was loyal throughout the war, and declares that—

"The fact of such loyalty *shall be a jurisdictional fact*, and unless the said court shall, on a *preliminary inquiry*, find that the person who furnished such supplies or stores, or from whom the same were taken, as aforesaid, were loyal to the Government of the United States throughout the war, the court shall not have jurisdiction of such case, and the same shall, without further proceedings, be dismissed."

The Government's Brief (at the bottom of page 6) adopts the view taken by the Court of Claims, above quoted from page 9 of the Record, that the proviso in this Austin Act, in its legal effect is the exact *equivalent*, in the way of limiting jurisdiction, of the clause above quoted from section 4 of the Bowman Act.

This position of the Court of Claims and of the Government's Brief is, we submit, plainly erroneous, and which, we think, is shown by the following suggestions:

I.

The Austin Act Requires a Strictly Judicial and Final Judgment.

It can not be denied, and is not denied, but on the contrary, is distinctly admitted, and taken for granted, that the Austin Act radically differs from the Bowman Act, in that the Austin Act confers strictly judicial power and jurisdiction for judicial as distinguished from auditing investigation; and confers power and jurisdiction to render a strictly judicial judgment appealable to this court.

Not only is this, just stated, undisputed by the Government, but it can not be disputed, because the act, in so many words, gives the power to and imposes the duty on the court to do the very thing which sections 1, 2, 3, and 4 of the Bowman Act, in express words, prohibit being, by the court, done, namely, *the rendition of a judgment.* The language of the Austin Act in this regard (*R., p. 8*) we have already quoted, and is that the claim is referred to the Court of Claims "with full jurisdiction "and power in the said court to adjust and settle such "claim, and *to render a judgment* in said cause for the full "amount realized by the United States from the sale of "such cotton."

Here, then, the court's power to "adjust and settle" s a power which is consummated and ended in the rendition of a strictly judicial judgment, and nothing else but such a judgment is permitted.

When it comes to the proviso in the Austin Act, that proviso also, in express words, requires that the proof, in regard to loyalty, shall be *made to the court in the same trial which is to result in a judgment* for or against the claimant, and is not permitted to end in anything else. It is, in terms, made *to be a part of the trial* "that it shall be shown to the satisfaction of the court" that Sterling T. Austin remained loyal. So that the very words of this Austin Act make the trial of the question of loyalty to be a *part of the very trial, by the court, of the merits of the case,* instead of its making the trial of the question of loyalty to be "preliminary" to the trial on the merits, as is required by section 4 of the Bowman Act. (*22 Stats., 486.*)

These two acts, to wit, the Bowman Act and the Austin Act, were pending before Congress, and were considered, at the same time, and were approved on the same 3d of March, 1883. This direct and palpable *dissimilarity and antagonism* between the two acts, in the requirement in the one (the Bowman Act) that the question of loyalty shall be first tried, separately and independently, before the merits of the case are entered upon; while in the other (the Austin Act) no such separate and independent preliminary trial is required, but on the contrary, the trial of the question of loyalty is made to be a part of the trial of the merits by the court in reaching its decision, and also the *absence* of all provision that the failure to find loyalty in fact, as distinguished from loyalty in law, in the Austin Act, and which is expressly *present* in the Bowman Act, show that, in this regard, the two acts were not meant to be, and are not, identical as to the matter of limiting jurisdiction, as they were made to be identical by the court below. (*R., p. 9.*)

II.

Deliberate and Material Change of Words in New Statute Changes Sense.

It is an elementary rule for the interpretation of statutes which are *in pari materia as to a specific subject-matter*—in this case *in pari materia* as to the matter of giving jurisdiction to the Court of Claims—and especially where the statutes were being considered, and were passed, at the *same time*, that material *diversity* in the language of the two statutes shall not be held to be an immaterial diversity, and that all the words of the respective acts shall, as they stand, receive their full and natural effect.

To the proposition stated in the text, at page 373 of 23 American and English Encyclopædia of Law, that "a "deliberate or material change of expression must be "taken, *prima facie*, to import a change of intention," the author cites the following cases in Note 2, on said page 373:

Rex v. *Great Bolton*, 8 B. & C., 71; 15 E. C. L., 154;
St. Losky v. *Green*, 9 C. B., N. S., 375; 99 E. C. L., 375;
Ricket v. *Metropolitan R. Co.*, L. R., 2 H. L., 207;
Reg. v. *Bullock*, L. R., 1 C. C., 117;
Lawrence v. *King*, L. R., 3 Q. B., 348;
Reg. v. *Price*, L. R., 6 Q. B., 416;
Dickenson v. *Fletcher*, L. R., 9 C. P., 8;
U. S. v. *Bashaw*, 1 C. C. A., 653;
Lehman v. *Robinson*, 59 Alabama, 240;
Heinssen v. *Colorado*, 29 Am. & Eng. Corp. Cases, 532;
Mechanics', &c., Bank v. *Versailles Woolen Co.*, 59 Connecticut, 347;
Parkinson v. *State*, 14 Maryland, 191;

74 American Decisions, 522;
Commonwealth v. *Messenger*, 4 Mass., 462;
Rutland v. *Mendon*, 1 Pickering, 156;
State v. *Hale*, 25 New Jersey Law, 328;
James v. *Patten*, 6 New York, 9;
Taggard v. *Rooseveldt*, 2 E. D. Smith (N. Y.), 102;
8 Howard's Practice, New York, 143;
Bloom v. *Richards*, 2 Ohio State, 403;
Rich v. *Keyser*, 54 Pennsylvania State, 89.

In the case of the *Inhabitants of Rutland* v. *Inhabitants of Mendon*, 1 Pickering, 153, the court, in construing the words of a statute of 1793, regarding a pauper's acquisition of the right of settlement, was required to construe said statute by reference to the terms employed in a former statute of 1789. In that case it was admitted that the pauper had not acquired a right of settlement under the statute of 1789; but it was insisted that, by construing the statute of 1793 as *in pari materia* with that of 1789, the meaning of the statute of 1793 was found to entitle him to his settlement. In regard to this the court says:

"This position can not be maintained. It is true that statutes *in pari materia* are to be construed together: as, if a provision in one statute receives a judicial construction, and it is inserted in another, the *same construction* would be given to it; but, where *the clause varies, it shows a different intention in the legislature.* The legislature did not mean that a residence of a year and five months, under the statute of 1789, should make a part of the three years required by the statute of 1793."

In the case of *Blackburn* v. *Inhabitants of Walpole* (9 Pickering, 97, 102–3–4) the opinion is by Chief Justice Parker. This case, in its legal elements, is very much like the one at bar. There, as in the case at bar, there were *two acts that were in pari materia*, and were to be contrasted in ascertaining the meaning of the require-

ment of the act touching the matter of having, in the list of assessments, a separate column for an income tax. One of the acts (that of 1824) required such a separate column (p. 102), and the other act, passed the same day, did *not* require such a column. The requirement in the first-named act is in these words:

"That the Treasurer shall require the Selectmen or Assessors to make a fair list or lists of their assessments, setting forth, in distinct columns, against each person's name, how much he is taxed for polls, and for real and personal estate and *income*, respectively, as aforesaid."

The requirement in the other act, of the same day, changes the requirement, and gives a form *having no column for income*, but including it, as we must suppose, in the column for personal estate. The court held that this *difference in the language* of the two acts could not be held to be an *immaterial difference*, and that it indicated a change of intention on the part of the legislature. The court, therefore, held that the tax lists need not have a separate column for income.

In the case of *Bloom* v. *Richards* (2 Ohio State Reports, 387, 403), the elaborate opinion is by Judge Thurman, and related to the question whether a certain contract could be specifically enforced although made on Sunday. The statute of Ohio, upon which the validity of this contract depended, is given at pages 394–5, and, in short, provides "that if any person of the age of fourteen years "and upward shall be found on the first day of the week, "commonly called Sunday, sporting, rioting, quarreling, "hunting, fishing, *or at common labor* (works of necessity "and charity only excepted), he or she shall be fined," &c.

The question in the case was whether the making of this contract was within the meaning of the words "common labor." In the opinion, at page 400, the court quotes the Sunday laws of many of the States, and points to the words descriptive of the thing prohibited to be done on

Sunday as found in these various statutes. Then, on page 403, after pointing out that the word "business" found in said foreign statutes was not synonymous with the words "work and labor," the court adds the following:

"When a *considerable* change is made in the phraseology of a former law the inference is reasonable that a change of meaning was also intended. Now, with perhaps but one exception, all the foreign statutes I have quoted are of much older date than ours. That they were well known to the framers of our law will be apparent to any one who will make a comparison. The similarity, and often identity of language, evidently show that our statute is in part copied from them. *But the word 'business' is left out. Is it reasonable to suppose that this was done without design?* It certainly is not. Was it done upon the supposition that the word was useless—that it was embraced by the expression 'common labor'? This is altogether improbable. The legislature knew that the expressions were not synonymous, and that much that is 'business' is not 'labor.'"

These cases we have above cited from said Note 2, page 373, of 23 American and English Encyclopædia of Law, and numerous others, establish the proposition that where "*a material and deliberate change of expression is found by contrasting two statutes, in pari materia, and especially where they were passed at the same time, there the difference in the language will be held to import a difference of intention.*"

Here, then, we have two acts of Congress, of the same date, and which are *in pari materia* so far as relates to the matter of settling up private claims against the Government. In the one (the Bowman Act), it is carefully and deliberately provided that the court shall render no judgment; that the trial of the question of loyalty shall be a separate, independent, and "preliminary" trial, distinct from the trial of the merits; that the fact of loyalty

shall be a "jurisdictional fact," and that the merits of the case shall not be entered upon at all, but that the case shall be dismissed if loyalty is not in fact proven.

But, in the Austin Act, Congress *leaves totally* out of it all this multiplication of provision found in the Bowman Act; and which prohibits entirely, and in every event, a judicial trial and the rendition of a final judgment; and prohibits the court from even entering upon an auditing trial or investigation of the merits until after it has found, in a separate and "preliminary" trial, the existence of loyalty in fact, and declares that such loyalty in fact shall be "jurisdictional." And the Austin Act, in lieu thereof, expressly authorizes and commands a strictly judicial trial to be instituted, conducted, and prosecuted *to its end*, resulting in a strictly judicial and final judgment on their merits; and, in that judicial trial, requires the court to decide the question of loyalty according to the principles of constitutional and general law, including therein the question of the effect of full executive pardon as bearing upon proof of loyalty.

The Brief of the Government and the position of the court below assert that these two statutes, which are diametrically opposed to each other in every matter relating to the kind of trial to be had, relating to the matter of the kind of conclusion to be reached, relating to the matter of how loyalty is to be proved, and relating to every other material feature of the two trials, are, notwithstanding this, in effect identical.

It seems to us—and we submit it with the utmost respect to the court below and to the counsel for the Government—that such a contention is utterly untenable.

Here are two statutes, each conferring diverse jurisdiction upon the Court of Claims, over claims against the Government. In the one it is carefully and solicitously provided that "the fact of loyalty shall be a 'jurisdic-" tional fact;' and unless the said court shall, on a pre-

"liminary inquiry, find that the persons who furnished "such supplies or stores * * * were loyal to the Gov- "ernment of the United States throughout the war, the "court shall not have jurisdiction of the case, and the "same shall, without further proceedings, be dismissed;" whereas, in the act giving jurisdiction in the other case, now at bar, all this is *omitted;* and the court is given full "jurisdiction and power * * * ~~were~~ to render a judg- "ment in said cause for the full amount realized by the "United States from the sale of such cotton;" adding, in a proviso, that it shall be shown to the satisfaction of the court, in that same trial on the merits, that Austin was loyal.

Here, in this last, is no "*preliminary*" trial prescribed or required—no ousting of jurisdiction is, in terms, prescribed; but on the contrary, the court (unlike what is permitted under the Bowman Act) was authorized to render judgment *against* Austin on the ground of *disloyalty*, although every other prerequisite to a judgment *in his favor* was abundantly established, except that he failed to prove loyalty, either by establishing the fact of *actual* loyalty *or by establishing its equivalent through the oblivion which is wrought by executive pardon.*

Hence, there is vital error in the holding of the court below that this Austin Act required a separate "preliminary" trial of the question of loyalty *before* entering upon the merits of the case, and as an independent, distinct, and "jurisdictional fact."

III.

Words which, when Re-enacted, had Received an Adjudicated Sense, have the same Sense in the Re-enactment.

The next suggestion we make is based upon the substantial identity of the provisions in section 3 of the Captured and Abandoned Property Act (*12 Stats., 820*), and

of the proviso in the Austin Act, so far as regards the matter of showing loyalty.

The language of section 3 on this subject is as follows:

"And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; *and on proof, to the satisfaction of said court, of his ownership of said property, of his right to the proceeds thereof, and that he has never given aid or comfort to the present rebellion, to receive the residue of such proceeds,*" &c.

Here, in express, unambiguous, and unmistakable terms, the authority to "render judgment" in favor of the claimant is coupled with the condition precedent that he shall establish loyalty. This condition precedent is expressed in said section 3 of the Captured and Abandoned Property Act in the *very same* words which are employed in the proviso in the Austin Act, the words in each case stating the prerequisite to the right to obtain judgment being that proof shall be "shown to the satisfaction of the court" of the existence of the condition precedent to recovery. In the Captured and Abandoned Property Act the thing to be so established "to the satisfaction of the court" as a condition precedent to recovery relating to loyalty is expressed in these words:

"That he (the claimant) has never given any aid or comfort to the present rebellion."

The thing relating to loyalty required by the Austin Act to be established as a condition precedent to recovery is that neither Austin nor his representatives "gave any aid or comfort to the late rebellion, but were throughout the war loyal to the Government of the United States."

It is, we most confidently submit, simply impossible for any refinement of criticism to establish, in substance, any difference between these two provisions so far as re-

lates to the matter of their requiring the court to pass upon the question of loyalty and requiring the court to make this matter of loyalty to be a condition precedent to recovery. Nor is there any possible distinction between the two statutes in regard to there being an *absence* of any provision making the trial of the question of loyalty to be an independent trial "preliminary" to the judicial trial by the court of the merits of the case. It is, therefore, demonstrably true that any decisions which hold that amnesty being shown in a suit brought under the Captured and Abandoned Property Act is a satisfaction of this requirement as to loyalty in cases under said act are decisions having the *same effect* under the Austin Act.

We will come, in another connection, to the matter as to what cases have been decided under the Captured and Abandoned Property Act, holding that proof of amnesty does establish loyalty for all the purposes of recovery under said Captured and Abandoned Property Act.

IV.

Positions of the Court Below.

We now attempt to condense into a single statement the body of the argument, and processes, by which the court below reached the conclusion that, in the present case, proclamations of amnesty were not available to the claimant for the establishment of the loyalty required by the proviso in this Austin Act; that the loyalty required to be established by that act, as a condition precedent to the recovery, was loyalty in fact as distinguished from "legal loyalty" (*R., p. 15*), and that, since the court found that Austin was not loyal in fact, therefore the petition was dismissed.

The processes by which the court below reaches these conclusions may be stated as follows:

(*a*) That full pardon does not affect any rights that have vested in others directly, by the rendition of judgment for the offense pardoned, and which have been acquired by such others whilst that judgment was in force. In other words, amnesty does not *originate* or *create* rights which have been lost by judicial process prior to the amnesty. (*R., pp. 11, 12; Knote Case, 95 U. S., 149.*)

(*b*) That the trust which the policy and provisions of the Captured and Abandoned Property Act create, in favor of owners, standing in the position embraced by section 3 of said act, had, in the case of Austin, prior to his receiving the benefit of the general amnesty under the proclamation of the 25th of December, 1868, expired at the end of the two years from the termination of the rebellion, on the 20th of August, 1868 (*9 Wall, 56*), because on that day there ceased to be, in favor of anybody, including Austin, any right of action or any "trust" in such abandoned and captured property; that, therefore, Austin, after said 20th of August, 1868, stood in no "beneficial" relation whatever to said property; and the title thereof had been vested iu the United States in virtue of said expiration of said "trust" and of the provisions of what is known as the "Covering in Act" of the 30th of March, 1868 (*15 Stats., 251*), and which provided—

"That all moneys which have been received by any officer or employé of the Government, or any department thereof, from sales of captured and abandoned property in the late insurrectionary districts * * * shall immediately be paid into the Treasury of the United States, together with any interest which has been received or accrued thereon."

Hence, when the Austin Act was passed, he and his legal representatives were absolutely divested of all interest in and right to the property, whether legal or equit-

able; and the Government was the full and absolute owner of said property; and, being so divested of all interest, any right of recovery which he had must originate in the provisions of new legislation creating the rights sued for, *de novo*.

(*c*) That it was the intention of the Austin Act, as manifested by the proviso, to create no rights in Austin, either of action in the Court of Claims or otherwise, except upon the establishment of *loyalty in fact* as distinguished from the "legal loyalty" which is established by amnesty.

(*d*) That the position of the claimant in regard to the legal effect of amnesty upon the right of recovery is one which asserts that to require claimant to prove loyalty in fact, as distinguished from what the court calls "legal loyalty" (*R., p. 15*)—this notwithstanding the claimant was entitled under this action to the benefit of the general amnesty—is to render the legislation *unconstitutional*, because it renders it an attempt to take from amnesty its constitutional and legal effect.

(*e*) And, having found that Austin was not loyal in fact, his petition was dismissed.

This we believe to be a just statement of the processes by which the court reached the conclusion to dismiss this petition.

We now state our reply to these positions, such reply really embodying the *whole argument*, as, indeed, do the positions which we have just stated as those taken by the court. We need not reply to these positions of the court below in the order in which we have just stated them.

V.

To the position of the court, stated at pages 12 and 13 of the Record, that all equity and trust relations of Aus-

tin to the property in question were completely at an end and gone before he became entitled to the benefit of general amnesty, because such trust and equitable rights expired on the said 20th of August, 1868, at the expiration of two years from the suppression of the rebellion, and because, at the time of that expiration, Austin was not entitled to the benefit of any amnesty, since none existed to which he was entitled until the proclamation of the 25th of December, 1868, we reply, first, that we do not see that this position has anything to do with the merits of Austin's claim; because those merits depend. *not upon the existence in him of legal or equitable rights prior to the enactment of this Austin Act, but do arise out* of the Austin Act, and out of the Captured and Abandoned Property Act, the benefit of which last-named act he is given by this Austin Act in its removal of the two-year bar of the statute of limitations created by that act.

VI.

Mistake, Below, in Ignoring Amnesty of July 4, 1868.

We reply, next, that this position of the court, asserting that at the expiration of said two years from the suppression of the rebellion Austin had not become entitled to the benefits of any amnesty, is simply a mistake of fact on the part of the court. Austin became entitled to the benefits of general amnesty under and by virtue of the proclamation of amnesty of July 4, 1868 (*15 Stats., 702*), and was, on the date of that proclamation, as much entitled to the benefits of general amnesty as he would have been under the proclamation of the 25th of December, 1883, had he not received pardon prior to the last-named amnesty.

VII.

Resolution of 30th March, 1868, Immaterial.

Next we reply to the positions which attach consequence to the fact that the said joint resolution of the 30th of March, 1868 (*15 Stats, 251*), had covered into the treasury the property in question, and thereby had cut off all equities of Austin in the property; that the provisions of this joint resolution are, as applied to the case at bar, utterly insignificant and without effect, for several reasons, some of which we will come to in another connection, and which other reasons arise out of the general effect of the Austin Act, in the way of creating rights of action. But now we give this additional reason why the joint resolution is without consequence in this case.

We have already above quoted the provisions of said joint resolution, so far as relates to covering into the treasury. It is simply a provision that all moneys that have come into the hands of the officers and employés of the Government from sales of captured and abandoned property, which had not been already covered into the treasury, should be immediately paid into the treasury, together with interest. Now, this provision of the joint resolution is manifestly one which *adds nothing* to the requirements of section 2 of the Captured and Abandoned Property Act, which, in express words, requires "that all sales of such property shall be at auction to the "highest bidder, *and the proceeds thereof shall be paid into "the treasury of the United States.*" So that, in contemplation of law all these proceeds for which Austin sues were in the treasury from the time they were received, and to this fact said joint resolution *adds nothing;* and all the moneys which were recovered under the decisions in the numerous cases cited by the court (*R., p. 12*), such as *Armstrong's case, Padelford's case, Pargoud's case, Carlisle's case, Osborne's case, and Kline's case,* which were success-

fully prosecuted under the Captured and Abandoned Property Act, were cases of recovery under that act, *notwithstanding* the fact that the proceeds sued for in these cases were, in contemplation of law, already in the treasury, in virtue of said section 2 of said Captured and Abandoned Property Act, and notwithstanding the fact that all legal, equitable, and trust rights in, and relations to the proceeds sued for had, in each of those cases, as effectually come to an end as the court below says they had in Austin's case.

VIII.

Austin Act did not Intend to Prohibit Consideration of Amnesty as Proof of Loyalty.

We next come for reply to what is the main position of the court below in reaching the judgment dismissing our petition, to wit, to the position asserting that the *intention* of the proviso of the Austin Act was to require "actual loyalty" to be established, as a matter of fact, as distinguished from that constructive or legal loyalty which is shown by the general amnesty; that such intention and requirement is not rendered unconstitutional by denying to amnesty its constitutional effect in a judicial trial, and that this showing of loyalty, *in fact, is made jurisdictional;* and the absence of such proof of loyalty defeats the right of recovery.

Our first suggestion in reply to this position of the court, and to its argument, going to show how reluctant courts are in reaching the conclusion that an act of Congress is unconstitutional (*R., p. 18*), is that we have not only not claimed, but we have not even thought of the claim that the Austin Act is in any particular unconstitutional. On the contrary, our position is that the true construction of the Austin Act is that, *since it re-*

quires the court to make a strictly judicial trial, as distinguished from a mere investigation or auditing trial, and to reach and render a strictly judicial and final judgment, a pealable to this court, and has given to the court jurisdiction to proceed, in such trial, to the end and to adjudicate every material question arising in that trial, including the question of loyalty, that, therefore, the conclusive intention, attributed by the law to the act, is that the loyalty required to be established may be established by proving that Austin was entitled to general amnesty, and that it is the error of the court that has attributed an unconstitutional meaning and design to Congress under its alleged purpose to deny to amnesty, in such judicial trial, its proper constitutional effect, to wit, of complete proof of loyalty, whether actual, legal, or constructive.

How we establish this proposition just stated will be more fully brought out when we come to notice, in detail, the legal effect of the rulings of this court in the case cited at the top of page 12 of the Record, and other cases which we may notice below. But we state, *here and now*, in a general way, that it is fully established by the adjudications of this court, rendering judgments in favor of disloyal claimants, notwithstanding the existence of statutes which, at the time of such judgments, contained provisions regarding loyalty which more clearly required affirmative proof of *actual* loyalty before the judgments could be rendered than is required by this Austin Act.

In enforcement and illustration of this, notice the provision of the Drake Amendment (*16 Stats., 235,*) which reads as follows:

"*Provided*, that no pardon or amnesty granted by the President, whether general or special, by proclamation or otherwise, nor any acceptance of such pardon or amnesty, nor oath taken, or other act performed in pursuance or as a condition thereof, *shall be admissible in evidence* on the part of any claimant in the Court of Claims as evi-

dence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; nor shall any *such pardon, amnesty,* acceptance, oath, or other articles aforesaid, heretofore offered or put in evidence on behalf of any claimant in said court, *be used or considered by said court, or by the Appellate Court* on appeal from said court, in deciding upon the claim of said claimant, or any appeal therefrom, *as any part of the proof to sustain the claim of the claimant,* or to entitle him to maintain his action in said Court of Claims, or on appeal therefrom; but proof of loyalty required by the 12th section of the act of March 3, 1863, entitled 'An act to amend an act to establish a court for the investigation of claims against the United States,' approved February 24, 1855, and by the third section of the act entitled 'An act to provide for the collection of abandoned property, and for the prevention of fraud in insurrectionary districts within the United States,' approved March 12, 1863, and by the third section of the act entitled 'An act to provide for appeals from the Court of Claims, and for other purposes,' approved June 25, 1868, *shall be made by proof of the matters required by said sections, respectively, irrespective of the effect of an Executive proclamation, pardon, amnesty, or other act of condonation or oblivion.*"

Here, then, we have a duplication of provisions, applicable to a strictly *judicial proceeding in the courts,* seeking to compel the court to require proof of loyalty *in fact,* and seeking to deny the court jurisdiction if loyalty in fact should not be established, and seeking to make such proof jurisdictional; and seeking to take from amnesty its effect of being full proof of loyalty in such judicial trial. And yet, notwithstanding these provisions, and notwithstanding the provisions requiring the proof of loyalty, contained in the other statutes named in said Drake Amendment, the court reached the conclusion that amnesty *satisfied the requirements of each and all of these statutes,* except the requirement, in the Drake Amendment, that the court should give no weight, as

proof of loyalty, to the presidential pardon; and this clause, so prohibiting, the court held to be unconstitutional and void.

The requirements of the 12th section of the act of March 3, 1863, as to proof of loyalty are found in 12 Stats., at page 767. This is the general act conferring and defining the jurisdiction of the Court of Claims and of this court, and amending the act of February 24, 1855 (*10 Stats., 612*). The loyalty provision referred to in the Drake Amendment is in the proviso of section 12, and is in these words:

"That, *in order to authorize the said court to render a judgment in favor of any claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant, and the* original and every prior owner thereof where the claim has been assigned, *has at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said Government, which allegations may be traversed by the Government, and if on the trial such issue shall be decided against the claimant his petition shall be dismissed.*"

A more explicit and unmistakable requirement of proof of loyalty *in fact*, as distinguished from "legal loyalty," can scarcely be stated; unless, indeed, the provisions of the Drake Amendment furnish an example of a more explicit and unmistakable requirement of affirmative proof of loyalty in fact. And yet, nothwithstanding the continued existence of these provisions, this court came, at last, to steadily hold that this statute did not stand in the way of the recovery, by disloyal but pardoned claimants, o the proceeds of captured and abandoned property under the act relating to such property. In other words, the court steadily held that the existence of amnesty satisfied the requirements of this section as to the loyalty of claimants.

And so in regard to the provisions relating to loyalty contained in the 3d section of the Captured and Abandoned Property Act, and which we have above quoted (*12 Stats., 820*). This is a provision which only permitted a judgment to be rendered after the claimant had made proof that he had given any aid or comfort to the rebellion. Upon this language we have commented above.

So in regard to the provisions relating to loyalty required to be established by section 3 of the act approved June 25, 1868 (*15 Stats., 75*), giving the right of appeal to this court. The provisions of that third section relating to loyalty are in these words:

"That, whenever it shall be material, in any suit or claim before any court, to ascertain whether any person did or did not give aid or comfort to the late rebellion, the claimant, or party asserting the loyalty of such person to the United States during such rebellion, *shall be required to prove affirmatively that such person did, during such rebellion, constantly adhere to the United States, and did give no aid or comfort to the persons engaged in the said rebellion.*"

Yet, notwithstanding these provisions, found in the Drake Amendment, and in the 12th section of said act of the 3d of March, 1863 (*12 Stats., 767*), and in the 3d section of the Captured and Abandoned Property Act (*12 Stats., 820*), and in the 3d section of the act of the 25th of June, 1868 (*15 Stats., 75*), and with these acts in force, every judgment which has been rendered in the Court of Claims and in this court in favor of disloyal claimants (some of which cases are cited at the head of page 18 of the Record), proof of general amnesty was held to constitute the proof of loyalty required by these various statutes.

In view of these decisions by this court, it is, we submit, simply impossible to hold that the existence of am-

nesty in favor of Austin does not equally satisfy the requirement in said proviso in the Austin Act of proof of loyalty.

IX.

Where Court is Endowed with Jurisdiction Strictly Judicial, Congress can not Prescribe the Steps of the Trial.

Our next reply to the position of the court above stated is found in this, to wit: It being admitted by the parties and by the court below, and it being express and unmistakable in the act, that the trial required by the Austin Act is purely and *strictly judicial in its nature;* that the judgment authorized to be rendered *is of that nature, and is final,* and that the court was authorized to decide upon, according to the principles of law, all questions legitimately arising in such judicial trial of the case, including this question of loyalty, it results that the Congress could not, in contravention of the constitutional effect of proof of general amnesty, prescribe for the courts what effect should be given to the amnesty as constituting proof of *loyalty in fact as well as "legal loyalty,"* and that the Constitution makes the existence of such amnesty to be complete and conclusive, in such a judicial trial, proof of loyalty *in fact and in law.*

In further and full enforcement of the constitutional and legal principles just stated, we will now turn to a more detailed inspection of the cases in this court bearing upon those principles. We preface our citation from the cases in this court with some extracts from the rulings of this court which express the legal point to which we cite these cases.

Regarding the absence of power in Congress to modify, control, limit, or abridge the effect which the Constitution

gives to an executive pardon, we quote from *ex-parte Garland* (4 Wallace, 333, 380) the following:

"The power" (to grant reprieves and pardons) "thus conferred is unlimited, with the exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency or after conviction or judgment. *This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him can not be fettered by any legislative restrictions.*"

In regard to the reach, scope, and effect of a pardon, in the same case, the court says:

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and, when the pardon is full, it releases the punishment *and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.*

"There is only this limitation to its operation,—it does not restore offices forfeited or property or interests vested in others in consequence of the conviction and judgment."

Citing—

4 Blackstone's Commentaries, 402;
6 Bacon's Abridgement, tit. Pardon;
Hawkins, book 2, secs. 34 and 54.

Whilst it is within the competency of Congress to *withhold* from the courts *jurisdiction* in any case, yet, where Congress has decided to confer jurisdiction on one of the courts of the country as one of the courts of the Constitution (which the Court of Claims is, 13 Wall., bot. 154, top

155), and has authorized and required it to judicially try and adjudicate any case, up to and including final judgment, there, and in every such case, it is beyond the power of Congress to prescribe the steps, rules, and instrumentalities, in the way of evidence and the like, which the court shall adopt in conducting such trial and reaching and rendering such judgment; and it is beyond the power of Congress to qualify, modify, control, or in any degree affect that which the principles of law, whether constitutional or otherwise, make to be appropriate in such judicial trial.

Or, stating this in the language of this court as found in the case of *Murray's Lessee* v. *Hoboken Land and Improvement Company* (18 Howard, 284), where the court, speaking through Justice Curtis, says:

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which from its nature is the subject of a suit at common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

Or, taking the more directly pertinent language of this court in the *Klein Case* (13 Wallace, 146), where the court, speaking of the provisions of the Drake Amendment, limiting the effect as evidence of an executive pardon, and speaking of the want of power in Congress to prescribe rules of procedure for the courts in a strictly judicial trial, says:

"It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease, and it is required to dismiss the cause for want of jurisdiction.

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

"The court is required to ascertain the existence of certain facts, and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant, and an appeal has been taken to this court. We are directed to dismiss the appeal if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in his own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the Government in cases pending before it? We think not."

Then, after stating that this position of the court is not in conflict with the case of *Pennsylvania* v. *Wheeling Bridge Company* (18 Howard, 429), and after saying that in the last-named case "no arbitrary rule of decision was "prescribed in that case, but the court was left to apply "its ordinary rules to the new circumstances created by "the act," the court says:

"In the case before us, no new circumstances have been created by legislation. But the court is forbidden to give the effect to such evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary. We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power."

See same principle—

Kilbourn v. *Thompson*, 103 U. S., 190 to 195.

This doctrine, just quoted from the *Klein case*, has been repeated and reaffirmed by this court, and the other

courts of the United States, in numerous instances, examples of which will be found in—

Armstrong's Case, 13 Wallace, 155;
Carlisle's Case, 16 Wallace, 152;
Knote's Case, 95 U. S., 153;
Hart's Case, 118 U. S., 66;
Ex parte Laura, 19 Blatchford, 568;
Ex parte Garland, 4 Wallace, 333;
Witkowski's Case, 7 Ct. Clms., 397;
Waring's Case, 7 Ct. Clms., 507;
Backer's Case, 7 Ct. Clms., 554;
Anstell's Case, 7 Ct. Clms., 603;
Hardee's Case, 8 Ct. Clms., 319;
Green's Case, 8 Ct. Clms., 420;
Collie's Case, 12 Ct. Clms., 685–686;
Hart's Case, 16 Ct. Clms., 483;
Officer's Case, 20 Ct. Clms., 21.

In this Green case (at page 420), the Court of Claims says, speaking of the construction given by the Supreme Court to the words "aid and comfort," in the Captured and Abandoned Property Act:

"The construction given to the statute by the Supreme Court was that the term 'aid and comfort' related to the crime, and that the fact of guilt was not jurisdictional, but merely created a personal disability to maintain the action, which could be removed by pardon. (*Padelford* and *Klein Cases*, 7 C. Cls., pp. 144, 240.")

See also—

Colley Case, 12 Ct. Clms., 686;
Hart's Case, 16 Ct. Clms., 483;
Officers of South Carolina Troops, 20 Ct. Clms., 21.

With these prefatory quotations from the judgments of this and other courts, we now turn to a presentation of the characteristics of some of the principal cases in this

court bearing upon this matter of the want of power in Congress to prescribe what shall be the weight and value as evidence of a presidential pardon in the judicial trial of a case which Congress has submitted to the full and complete jurisdiction of the courts of the United States up to and including the rendition therein of a final judgment.

We are, however, relieved from here giving our own presentation of the cases by the fact that this court has presented a sufficiently full (and, of course, accurate) review of the decisions, which will be found in the opinion by Justice Field in *Carlisle's Case*, (16 Wallace, 147).

In that opinion, after stating what is in substance contained in the 5th paragraph of the head note as follows—

"The pardon and amnesty thus granted relieve claimants prosecuting in the Court of Claims for the proceeds of captured and abandoned property, under the act of Congress of March 12, 1863, from the consequences of participation in the late rebellion, and the necessity of establishing their loyalty in order to prosecute their claims, which would otherwise be indispensable to a recovery"—

the opinion proceeds to a review of the cases in the following words:

"In *Klein's Case* (13 Wallace, 128), which subsequently came before the court, an act of Congress, designed to deny to the pardon of the President the effect and operation which the court had thus adjudged to it, and which declared that an acceptance of pardon without disclaimer should be conclusive evidence of the acts pardoned, and be inoperative as evidence of the rights conferred by it in the Court of Claims and in this court, was held to be unconstitutional and void.

"In *Mrs. Armstrong's Case* (*Ib.*, 154), which was here at the last term, the court declined to consider whether the evidence was sufficient to prove that the claimant had given aid and comfort to the rebellion, and held that the proclamation of pardon and amnesty issued by the

President on the 25th of December, 1868, entitled her to the proceeds of her captured and abandoned property in the Treasury without proof that she never gave aid and comfort; that the proclamation, granting pardon unconditionally and without reservation, was a public act, of which all courts of the United States were bound to take notice, and to which all courts were bound to give effect.

"In *Pargoud's Case* (*Ib.*, 156), also here at the last term, the claimant stated in his petition that he was guilty of participating in the rebellion, but that he had been pardoned by the President, by special act, in January, 1866, and also by operation of the President's general proclamation. The Court of Claims decided against the claimant on the ground that his petition did not aver that he had not given any aid or comfort to the rebellion, and did not sufficiently aver a pardon by the President. This court reversed the judgment, following the decision in *Mrs. Armstrong's Case*, and holding that the President's proclamation of December 25, 1868, relieved claimants of captured and abandoned property from proof of adhesion to the United States during the civil war.

"After these repeated adjudications, it must be regarded as settled in this court that the pardon of the President, whether granted by special letters or by general proclamation, relieves claimants of the proceeds of captured and abandoned property from the consequences of participation in the rebellion and from the necessity of establishing their loyalty in order to prosecute their claims. This result follows, whether we regard the pardon as effacing the offense, blotting it out, in the language of the cases, as though it had never existed, or regard persons pardoned as necessarily excepted from the general language of the act, which requires claimants to make proof of their adhesion during the rebellion to the United States. It is not to be supposed that Congress intended by the general language of the act to encroach upon any of the prerogatives of the President, and especially that benign prerogative of mercy which lies in the pardoning power. It is more reasonable to conclude that claimants, restored to their rights of property by the pardon of the President, were not in contemplation of Congress in passing the act, and were not intended to be embraced by the requirement in question. All general terms in

statutes should be limited in their application, so as not to lead to injustice, oppression, or any unconstitutional operation, if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature."

Citing—

United States v. *Kirby*, 7 Wallace, 482.

Such is the history of the provisions of the Captured and Abandoned Property Act as written in the judicial history of the courts of the United States, including this court. That history expressly and unmistakably records the facts that these courts have unanimously held that neither the words in the Captured and Abandoned Property Act (*12 Stats., 820*) which prohibit the rendition of a judgment for the proceeds of captured and abandoned property unless upon the condition precedent of "proof to the satisfaction of the court that the owner never gave any aid or comfort to the present rebellion," nor the words in the 12th section of the act defining the jurisdiction of the Court of Claims of March 3, 1863 (*12 Stats., 767*), which say that, in order to entitle such owner to any judgment, his petition must set forth that he has at all times borne true allegiance to the United States, and has not in any way voluntarily aided, abetted, or given encouragement to the rebellion, nor the words of the 3d section of the act of June 25, 1868 (*15 Stats., 75*), giving this court jurisdiction on appeal of captured and abandoned property cases, declaring that, in order to recover the proceeds of such property, "the claimant shall be re-"quired affirmatively to prove that such person did give "no aid or comfort to the persons engaged in the said "rebellion," nor the intense and reduplicated words of the Drake Amendment (*16 Stats., 235*), prohibiting the giving of any effect to amnesty, and prohibiting the rendition of any judgment, except upon full proof of loyalty in fact, could, or did, overcome the effect of the presi-

dential pardon, or defeat recovery by claimants entitled to the benefit of such pardon, and even those who, in their petitions, allege their disloyalty.

In view of this history, so written, it seems to us impossible that it should be reasonably contended that, whilst these statutes, last referred to, do not stand in the way of such recoveries by disloyal claimants, yet the proviso in the Austin Act shall be held to defeat recovery on ascertaining that he was disloyal, and we really have no serious apprehension that this court will reach the conclusion that said proviso does defeat claimant's recovery.

X.

We now turn to an additional and distinct reply to the position of the Court of Claims.

We have already seen that the words of the proviso in the Austin Act regarding loyalty are identical, and, in the main, word for word, with those found in section 3 of the Captured and Abandoned Property Act. In said section 3 of the latter act the words relating to loyalty are: "Proof to the satisfaction of the court that he has "never given aid or comfort to the present rebellion." In the Austin Act the words relating to loyalty are: "Shown "to the satisfaction of the court that * * * Austin "* * * never gave any aid or comfort to the rebel- "lion, but was, throughout the war, loyal to the Govern- "ment of the United States." These words are exact equivalents of each other in their substance.

By what we have gone over, we have seen that these words in the Captured and Abandoned Property Act, above quoted, relating to loyalty, and also the effect of the existence of amnesty in favor of a claimant, had received the interpretation which we have above quoted from the opinion of Justice Field in *Carlisle's Case* (16

Wallace, bot. p. 153), where the court says, speaking of the interpretation of the words requiring proof of loyalty:

"It is not to be supposed that Congress intended, by the general language of the act, to encroach upon any of the prerogatives of the President, and especially that benign prerogative of mercy that lies in the pardoning power. It is more reasonable to conclude that claimants, restored to their rights of property by the pardon of the President, were not in contemplation of Congress in passing the act, and were not intended to be embraced by the requirement in question. All general terms in statutes should be limited in their application so as not to lead to injustice, oppression, or any unconstitutional operation, if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature."

Citing—

United States v. *Kirby*, 7 Wallace, 482.

With that interpretation of these words, requiring proof of loyalty in order to recovery in the former statutes, Congress, in the Austin Act, re-enacted the same words, and, in so re-enacting these words, Congress used them with the interpretation and meaning which had been fixed upon them by the almost innumerable decisions of the courts of the United States, including the decisions of this court.

These decisions Congress is presumed, when it passed the Austin Act, to have been familiar with.

In regard to this rule of interpretation, which makes to be a part of a re-enacted statute a construction which the former statute had received by the courts before its re-enactment, section 367 of Endlich on the Interpretation of Statutes states as follows:

"The importance, in the construction of a statute, of a comparison of the same with earlier statutes, *in pari materia*, has already been pointed out. A recourse to such statutes, however, necessarily involves a recourse to

the construction placed upon them by the courts; for *such decisions become virtually a part of the law*, and, aside from this consideration, as the comparison of former acts *in pari materia* proceeds upon, and is justified and demanded by, the principle that the legislature can not be presumed ignorant of previous legislation, so a recourse to the construction put by the courts upon words used in such acts is based upon the reasonable assumption that where the legislature has reproduced language upon which a case has been decided it must have known the interpretation put upon them in that decision. *It is but a corollary to this assumption that where cases have been decided on particular forms of words in courts of justice, and those forms of words are then used in legislative enactments, the legislature, in the absence of anything in the statutes showing that it did not mean to use them in the sense attributed to them by such judicial construction, must be presumed to have used them in that sense.*"

The cases cited by the author in support of this doctrine are in Note 64, as follows:

Barlow v. *Teal*, L. R., 15 Q. B. D., 403, per Coleridge, C. J.;
The Abbottsford, 98 U. S., 440;
Commonwealth v. *Hartnett*, 3 Gray (Mass.), 450;
Exp. Banks, 28 Alabama, 28;
Bloodgood v. *Grasey*, 31 *Id.*, 575;
Tuxbury's App., 67 Maine, 267;
Whitcomb v. *Rood*, 20 Vermont, 49;
Frink v. *Pond*, 46 New Hampshire, 125;
McKee v. *McKee*, 17 Maryland, 352;
County Seat of Linn County, 15 Kansas, 500.

The above-cited case of *The Abbottsford* (98 U. S., 444) fully sustains the language of the text.

The case of *Commonwealth* v. *Hartnett* (3 Gray, 450) is to the same effect. At the bottom of page 452, in the opinion by Metcalf, J., is the following:

"It is a common learning that the *adjudged construction of the terms of a statute is enacted, as well as the terms them-*

selves, when an act, which has been passed by the legislature of one State or country, is afterwards passed by the legislature of another. So when the *same* legislature, in a later statute, uses the terms of an earlier, *one which has received a judicial construction, that construction is to be given to the later statute.* And this is manifestly right. For if it were intended to exclude any known construction of a previous statute, the legal presumption is that *its terms would be so changed as to effect that intention.*"

Citing—

6 Dane Ab., 613;
Kirkpatrick v. *Gibson's Exrs.*, 2 Brock., 388;
Pennock v. *Dialogue*, 2 Pet., 18;
Adams v. *Field*, 21 Vermont, 266;
Whitcomb v. *Rood*, 20 *Id.*, 52;
Rutland v. *Mendon*, 1 Pickering, 156;
Myrick v. *Hasey*, 27 Maine, 17.

In *Ritchie* v. *Smythe* (13 Wallace, 165), speaking of the obligation of the courts to give to the same words in a new statute the sense which they had received in a former statute, the court says:

"Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject when there is no language used indicating an intention to produce such a result? *Both acts are in pari materia*, and it will be presumed that if the same words be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention." (*Dwarris on Stats.*, 701–66.)

In the case of the *United States* v. *Central Pacific Railroad Co.* (118 U. S., 235), this doctrine of the case of Ritchie is reaffirmed, and the court will carefully observe that, in order to the application of this rule, *it is not necessary that the words being construed in the later statute*

should be identical with the words with which they are being compared in the earlier statute. It is only necessary that they should be substantially the same. Speaking of this point, the opinion, after alluding to the sense which the words being construed received in the former decision of this court in the case of *United States* v. *Denver Pacific Ry. Co.* (99 U. S., 460), states as follows:

"This court, having thus interpreted the act of July 1, 1862, we can not, consistently with the established rules of construction, give a *different* meaning to SUBSTANTIALLY the same words in the act of May 7, 1878. (*Ritchie* v. *Smythe*, 13 Wall., 162.) In the act of July 1, 1862, the provision is that 'all compensation for services rendered for the Government shall be applied to the payment of said bonds.' In the act of May 7, 1878, the words are, that 'the whole amount of compensation * * * for services rendered for the Government shall be retained by the United States,' one-half to pay interest, and the other half to be turned in the sinking fund. If the two acts are to be construed together as one act, we must give the *same meaning to like expressions in both.*" We can not say in one case that the compensation mentioned means compensation only for services on *aided* roads, and in the other that it includes compensation for services on roads *not aided.*"

In *United States* v. *Bowen* (100 U. S., 513), speaking on the same point, this court says:

"When the meaning is plain, the courts can not look to the statutes which have been revised to see if Congress erred in that revision, *but may do so when necessary to construe doubtful language used in expressing the meaning of Congress.*"

So in the case of *Viterbo* v. *Friedlander* (120 U. S., 724), the court says:

"Laws *in pari materia*, or upon the same subject-matter, must be construed with a reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another."

In *United States* v. *Freeman* (3 Howard, 564–5), the court says:

"The correct rule of interpretation is that, if divers statutes relate to the *same thing*, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts *in pari materia* are to be taken together as if they were one law. (*Doug., 30; 2 Term Rep., 387, 586; 4 M. & Selw., 210.*) *If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of the statute.* (*Lord Raym., 1028.*) And if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attach to the words of a *former* statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute."

Citing—

Morris v. *Mellin*, 6 Barn. & Cress., 99.

The same thing will be found in—

Rex v. *Londale*, 1 Burrows, 44;
Goldsmid v. *Hampton*, 5 C. B., N. S., 94;
Exp. Copeland, 2 De Gex, Machnaghton & Gordon, 28.

We give as our apology for here citing cases regarding a doctrine so elementary, fundamental, and universal in its application as that just stated, the fact that the court below, in construing the proviso in the Austin Act, has, we think, totally disregarded this elementary principle in failing to give to that proviso the sense which the same words had received from the adjudications of this court prior to the enactment of the Austin statute.

And we now beg that the court will carefully observe, in disposing of this point, regarding the interpretation of this proviso in the Austin Act, that the rule requiring that the sense to be now given to its language must be the *same sense* which the courts had so clearly, repeatedly,

and conclusively fixed upon these words as they existed in the Captured and Abandoned Property Act, is not a rule which, in its force, is *merely persuasive*, and one appealing to the *discretion* of the court, and which it may deal with according to its mere pleasure.

On the contrary, since the words in the Austin proviso and the loyalty clause in section 3 of the Captured and Abandoned Property Act *are the same in substance*, and have received from this court, by conclusive adjudication, their full and true legal sense as set down in the cases reviewed and reaffirmed in the *Carlisle Case* (16 Wallace, 153), therefore that sense, so set down, has become and is *a part of the act itself*, and is expressly held in the authorities just cited; and when these words were reenacted in the Austin Act, that sense, so judicially settled, became *a part of the Austin Act as much as if said sense were written, in the act, in express and unmistakable words.*

Hence this court must and will, we think, say that this proviso means just what it was adjudged to mean in that case of *Carlisle* (16 Wall., 153), reviewing and reaffirming all the cases, to wit, the sense and meaning that the pardon of the claimant's intestate constitutes the all-sufficient proof of loyalty required by the proviso in said Austin Act.

The authority just cited says that the legislature which re-enacts words which have received, from the courts, a fixed meaning is *presumed* to have *known* of such adjudged meaning. Not only is such presumption applicable to the Austin Act, but it is not too much to say that there is, in the whole history of the Government, not another statute, or another provision of a statute, relating to claims against the United States, the judicial construction of which had been so thoroughly and exhaustively considered and adjudicated upon by the Supreme Court, and the knowledge of which was so universally known to Congress and to all the people as was the sense which

this court had fixed upon the words of the loyalty clause in the third section of the Captured and Abandoned Property Act.

Indeed, the same men, in a large measure, framed both of these laws—the Captured and Abandoned Property Act and the Austin law. The Austin Act was passed eleven years after the decision of the Carlisle case, which sums up and reaffirms all the preceding cases relating to this loyalty clause and the effect of amnesty as proof satisfying the requirements of that clause.

With this knowledge, both presumed and actual, shall it be now successfully contended that Congress did not use these words in the sense which this court had fixed upon them? That sense is, as we have seen, actually *a part of the act itself* (101 U. S., 687; sec. 367, *Endlich on Stat.; Ib.*, sec. 1, note 1), and this court is no more, as we most respectfully submit, at liberty to ignore it than it is at liberty to ignore the unmistakable text and words of any other statute.

XI.

Captured and Abandoned Property Act Revi[illegible]ed.

We now turn to an additional view of the case which is akin to the one last considered, but still a view which is distinct from it—at least in some of its aspects.

Since there was, at the date of the passage of the Austin Act, no jurisdiction in the Court of Claims, or in any other court where this Austin case could be prosecuted, and since there was no "statute of limitations" which could have been referred to or meant by these words "statute of limitations" in the Austin Act, except the two-year limitation provided for in the Captured and Abandoned Property Act, therefore the provision in the Austin Act which says, "And in such action the said

representative shall be entitled to recover as aforesaid, *any statute of limitations to the contrary notwithstanding*," is a limited and special revivor of the Captured and Abandoned Property Act in favor of Sterling T. Austin, and his representatives, for the purposes of this action; and by virtue of said revivor he became entitled to all the benefits of the Captured and Abandoned Property Act, except where the provisions of the Austin Act, if any there be, are in conflict with those of the Captured and Abandoned Property Act; and he became entitled to these including all the benefits resulting from the *interpretation* of that act as settled by the courts.

By what we have gone over we have seen that there is nothing in the Austin Act in conflict with the provisions of the Captured and Abandoned Property Act. It is the Captured and Abandoned Property Act over again to all intents and purposes, with the exception that it is a personal or private act instead of a general one. This makes no difference, however, as to its bearing upon our present point. We have seen that, so far as relates to the point that general amnesty proves loyalty for the purposes of the loyalty clause in section 3 of the Captured and Abandoned Property Act, the proviso in the Austin Act is *identical* with this loyalty clause in section 3 of the Captured and Abandoned Property Act Therefore, this proviso does not constitute a difference between the Austin Act and the Captured and Abandoned Property Act that prevents said provision, as to the statute of limitations, constituting a revivor of the Captured and Abandoned Property Act in its totality.

Now, in connection with this, take the additional proposition which is stated in section 168 of Sutherland on Statutory Construction, which reads as follows:

"Where an act is revived by a subsequent law, the legislature must be understood to give it, from the time

of its revival, *precisely* that force and effect which it had at the moment when it expired."

To this the author cites—

Cargo of Brig Aurora v. *United States*, 7 Cranch, 382;

Shipman v. *Henbest*, 4 Texas, 109;

Winter v. *Dickerson*, 24 Alabama, 92.

In the opinion in the above-cited case of the *Cargo of the Brig Aurora* v. *United States* (7 Cranch, 382) is the following, on pages 388 and 389:

"On the question when the operation of section 4 of the act should commence, we are of opinion that, *by reviving an act, the legislature must be understood to give it, from the time of its revival, precisely that force and effect which it had at the moment when it expired.*"

Unless the said provision of the Austin Act, relating to the statute of limitations, is given the effect of reviving, in favor of Austin, the Captured and Abandoned Property Act, for the purposes of this action, then no effect can be given to these words, because, as already remarked, there is no other subject-matter upon which these words could operate than the two-year limitation in said Captured and Abandoned Property Act.

In this view, therefore, if it is not a mistaken one, it is demonstrated that amnesty has furnished the proof of loyalty required by the proviso in the Austin Act.

XII.

The Hart Case, 118 U. S., 62.

It may not be inappropriate for us to here submit a few suggestions regarding the inapplicability, to the case at bar, of the decision of this court in the case of *Hart* v. *United States* (118 U. S., 62):

We know not that it will be attempted to assimilate this Hart case to the case at bar. It really has no application whatever to the case at bar; and this for the reason stated by this court why the Hart case was not in conflict with the doctrines of the Klein case, as explained on page 66 of 118 United States Reports.

This is demonstrated by the following suggestions:

(*a*) The Hart case was sent to the Court of Claims under the provisions of the act of June 25, 1868, now section 1063 of the Revised Statutes, authorizing heads of departments to transmit claims to said court.

(*b*) As stated in the seventh paragraph of the headnote in the report of this Hart case (in 16 Court of Claims Reports, 460), that act "confers on claimants neither "right nor remedy *which did not exist before*, and does "not extend to claims reserved for future legislation by "the joint resolution of March 2, 1867 (Revised Stats., "sec. 3480)."

That is, the Court of Claims acquired no jurisdiction of the case in virtue of its reference to the Court of Claims under section 1063 of the Revised Statutes, unless the case was one which Hart might have voluntarily prosecuted in the Court of Claims in the absence of such reference under said section 1063.

(*c*) A suit against the Government in the Court of Claims could not be prosecuted, owing to the non-suability of the Government, in the Court of Claims, in the absence of some statute giving that court jurisdiction.

(*d*) It was perfectly competent for Congress to withdraw, by law, from the jurisdiction of the Court of Claims any case of which it would have jurisdiction in virtue of section 1059 of the Revised Statutes, or in virtue of any other statute, for any reason that Congress might deem sufficient.

(*e*) Congress did withdraw from the jurisdiction of the Court of Claims all such claims as that sued for in the Hart case by virtue of the joint resolution of March 2, 1867 (14 Stats., 571), now section 3480 of the Revised Statutes, in its providing that it should be unlawful for any officer of the Government to pay any claim against the Government which accrued or existed prior to April 13, 1861, in favor of any person who promoted, encouraged, or in any manner sustained the rebellion.

(*f*) Since it was thus rendered unlawful to pay any such claim as Hart's, that fact withdrew from the Court of Claims any jurisdiction which it might have had of the case, either under said section 1059 or said section 1063 of the Revised Statutes, or any other law, because, if the claim could not be *paid*, a judgment therefor could not be rendered by the Court of Claims.

All this is fully explained by this court in its opinion in the *Hart Case* (118 U. S., 66–'7). On that page the court shows how the decision in that case was in harmony with the decision in the Klein case. Speaking of said joint resolution of March 2, 1867, and of the distinction between the Hart case and the Klein case, the court uses the following language:

"That, as the pardon conferred on him no new right, so the joint resolution did not take from him anything which the pardon had conferred; that it did not, *like the legislation considered in United States* v. *Klein, 13 Wall., 128, attempt to prescribe to the judiciary the effect to be given to a pardon, in regard to a matter to which the pardon extended*, but merely forbade certain debts to be paid until Congress should otherwise order; that a creditor of the United States can only be paid in accordance with the provision of the Constitution, Art. 1, Sec. 9, Subd. 7, which declares that 'no money shall be drawn from the Treasury, but in consequence of appropriations made by law;' that by this joint resolution, by law, that this claimant should draw no money from the Treasury, and that no general

appropriation should extend to his claim; that, therefore, no executive department could consider his claim; that the act of 1868 did not extend to claims covered by the joint resolution, *and that, as the claim in question could not be paid, the Court of Claims had no jurisdiction to proceed to judgment in regard to it on the reference made.*"

The case at bar is, as we have seen, really the Klein case, over again, in all the legal features here applicable; and, therefore, when the court decides that the Hart case is not in conflict with the Klein case it decides that it is not in conflict with the case at bar.

This is most obviously and self-evidently so, because that as in the Klein case so in the case at bar, this court is endowed with jurisdiction to try this Austin case *judicially and according to the principles of the Constitution and law applicable to such cases, creating, as the act itself expresses it, "full jurisdiction and power in said court to adjust and settle such claims, and to render judgment in the case," etc.*

When, as we have already and abundantly seen, an act confers upon one of the courts of the Constitution such full and unfettered jurisdiction to try and adjudicate, according to the principles of the Constitution and of the general law, such a subject-matter as this Austin claim, and to render a *final and judicial judgment in the case, it therein and thereby authorizes every step, according to such general principles of the Constitution and law, appropriate to make such trial and reach such judgment.*

That authority, of necessity, takes in and includes the right to *hear all testimony* that is made competent by such general constitutional legal principles, including the right to receive and consider the force of amnesty as proof of loyalty; and this power so conferred upon the court to consider and try all questions entering into such a judicial investigation can in no degree be controlled at any step by Congress.

This is, in effect, asserted by this court in *Hart's Case* (*supra*), where the court condemns as unconstitutional "the attempt of" the Drake amendment "to prescribe to "the judiciary the effect to be given to a pardon in re- "gard to a matter to which the pardon extended."

It is fully considered and expressly decided in the *Klein Case*, in which the court expressly declares (13 Wallace, 145) that this court "had decided that it was "the duty of the court to consider executive pardons, "and to give them effect in cases like the present as "EQUIVALENT TO PROOF OF LOYALTY," and that "the at- "tempt of Congress to deprive pardons of this effect is" an unconstitutional attempt "to prescribe a rule for the "decision of a case in a particular way."

And this same doctrine of the Klein case, just quoted, as to this very point is repeated in nearly innumerable cases where the Klein case is followed in regard to the effect of amnesty; examples of which will be found in—

Armstrong's Case, 13 Wallace, 155;
Carlisle's Case, 16 Wallace, 152;
Knote's Case, 95 U. S., 153;
Hart's Case, 118 U. S., 66–7;
Witkowski's Case, 7 Ct. Clms., 394;
Warring's Case, 7 Ct. Clms., 504;
Baker's Case, 7 Ct. Clms., 554;
Riley's Case, 7 Ct. Clms., 507;
Anstell's Case, 7 Ct. Clms., 603;
Hart's Case, 12 Ct. Clms., 686;
U. S. Officer's Case, 20 Ct. Clms., 21.

When a judgment is reached by the court in such a case, an appropriation by Congress to pay the judgment is a necessary result unless the alternative of blank repudiation is to be resorted to—this last being a resort which has never once been had, let it be said, to the honor of the Government, throughout its entire history.

Thus it is that express legislation is found in the Austin Act, creating the jurisdiction of the court in the case at bar, which meets and satisfied the provision of Article 1, section 9, subdivision 7, of the Constitution, declaring that "no money shall be drawn from the Treasury, but "in consequence of appropriations made by law." It is so met and satisfied by the *continuation of the jurisdiction of the Court of Claims and of this court throughout every step in the process of such judicial trial, including the rendition of a final judgment.*

SAMUEL SHELLABARGER,
J. M. WILSON, and
JOHN C. FAY,
For Appellant.

153-417

JAMES H. McKE

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

FLORINE A. AUSTIN, ADMINISTRATRIX of Sterling T. Austin, deceased, appellant,
v.
THE UNITED STATES.
} No. 259.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

FLORINE A. AUSTIN, ADMINISTRATRIX of Sterling T. Austin, deceased, appellant,
v.
THE UNITED STATES.
No. 259.

BRIEF FOR THE UNITED STATES.

The plaintiff filed her petition in the Court of Claims, charging that in the years 1863, 1864, and 1865 the military authorities of the United States took from Sterling T. Austin, her decedent, in the States of Louisiana and Texas, large amounts of cotton; that the United States sold said cotton and realized therefrom the sum of $367,500, which it appropriated to its own use; it charged that Sterling T. Austin had died, leaving a widow and children; and that neither he, nor his widow, or either of his children, gave any aid or comfort to the late rebellion, but they, and each of them, were and was, throughout the war, loyal to the Government of the United States.

The averments of the petition were denied by the United States.

The Court of Claims found as a fact in the case that Sterling T. Austin was disloyal; and it decided as a conclusion of law that the petition of the administratrix be dismissed.

The principal, if not the only question presented on this appeal is the one so elaborately discussed in the opinion of the Court of Claims, delivered by Judge Weldon as to the effect of the proclamation of the President of the United States of the 25th of December, 1868, extending—

> full pardon and amnesty for the offense of treason against the United States in adhering to the enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof.

ARGUMENT.

By act of Congress of March 3, 1883 (22 St. L., 804), the claims asserted in this petition were—

> referred to the Court of Claims, with full jurisdiction and power in said court to adjust and settle such claims and to render a judgment in said cause for the full amount realized by the United States from the sale of such cotton as shall appear from the evidence to have been so taken by said authorities; and in such action the said representatives shall be entitled to recover as aforesaid, any statute of limitation to the contrary notwithstanding: *Provided, however*, That it be shown to the satisfaction of the court that neither Sterling T. Austin, sr., nor any of his surviving representatives, gave any aid or comfort to the late rebellion, but were throughout the war loyal to the Government of the United States.

Sterling T. Austin died in 1879.

In the opinion delivered by Judge Weldon, it is said on p. 26 :

> That Sterling T. Austin in his lifetime, labored under a serious embarrassment in his own judgment, in the prosecution of this claim, must be apparent to any one who dispassionately reads and considers the facts and circumstances of this case. To him, there must have been one of two conditions, either he was not able to establish his loyalty, under the captured and abandoned property act, or the claim which is now made for the large amount of cotton, amounting to more than three times the amount of his entire property in 1861, is a mistake and a fabrication. This court was open to him on August 20, 1868, ready to adjudicate the claim in the freshness of the memory of witnesses then living, and able to testify with absolute certainty.

But it is contended on behalf of the claimant, the appellant here, that compliance with the requirement of the act of Congress, under which alone this petition was filed in the Court of Claims, "that it be shown to the satisfaction of the court that neither Sterling T. Austin, senior, nor any of his surviving representatives, gave any aid or comfort to the late rebellion, but were throughout the war loyal to the Government of the United States," is dispensed with and proof of those facts can not be exacted as a prerequisite to the maintenance of this action, because that general amnesty takes the place of proof of loyalty, and that by the proclamation of the President of the United States of 25th of December, 1868, full pardon and amnesty for the offense of treason against the United

States during the late civil war was declared unconditionally and without reservation to all and every person who directly or indirectly participated in the late insurrection or rebellion.

In support of this position the case of the *United States* v. *Klein* (13 Wall., 128) is relied on. That case was upon a petition filed in the Court of Claims December 26, 1865, and was decided by the Court of Claims May 26, 1869. An appeal was taken by the United States and filed on the 11th of December, 1869. To the appropriation bill for legislative, executive, and judicial expenses of the Government for the year 1870–'71, then pending in Congress, there was introduced as a proviso to an appropriation of $100,000, for the payment of judgments in the Court of Claims, a requirement—

> That no pardon or amnesty granted by the President, whether general or special, etc., shall be admissible in evidence on the part of any claimant in the Court of Claims, etc., nor shall any such pardon, etc., heretofore offered or put in evidence on behalf of any claimant in said court be used or considered by said court or by the appellate court on appeal from said court in deciding upon the claim of said claimant, etc.

This court held said proviso to be unconstitutional and void.

Mr. Justice Miller, with whom Mr. Justice Bradley concurred, in dissenting from the opinion of the court agreed to the proposition that the proviso was unconstitutional, but said :

> But I have not been able to bring my mind to concur in the proposition that under the act concern-

> ing captured and abandoned property there remains in the former owner, who had given aid and comfort to the rebellion, any interest whatever in the property or its proceeds, when it had been sold and paid into the Treasury, or had been converted to the use of the public under that act.

This case was followed by *Armstrong* v. *United States*, *ibid.*, 154, and *Pargond* v. *United States*, 156. In the Armstrong case it was held that the proclamation of 25th December, 1868, granted pardon unconditionally and without reserve, and enabled persons otherwise entitled to recover from the United States the proceeds of captured and abandoned property to recover it, though no proof be made as was required by the act that the claimant never gave any aid or comfort to the rebellion.

And in the Pargond case it was held that after the proclamation of December 25, 1868, it was unnecessary in the Court of Claims to prove such adhesion or personal pardon for taking part in the rebellion against the United States.

In *United States* v. *Anderson* (9 Wall., 65) it was held that as to abandoned and captured property taken under the act, that Congress had constituted the Government a trustee for *so much* of this property as belonged to the *faithful* Southern people.

While there can be no doubt as to the propriety of and the necessity for the decision rendered by this court in *United States* v. *Klein*, *supra*, as to the unconstitutionality of the "Drake amendment," because it was manifest that the purpose of that amendment was to deny to pardons granted by the President the effect which this court had

adjudged them to have and to forbid their recognition and consideration by this court; yet, in the general act of March 3, 1883, under which the Court of Claims acquires its jurisdiction in cases of this class, and in the special act of March 3, 1883 (22 Stat. L., 804), under which alone that court acquired jurisdiction in this case, it is prescribed as a *jurisdictional fact* that the loyalty of the claimant shall be first established. In the general act (22 Stat. L., 485), section 4 provides:

> The petition shall aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, did not give any aid or comfort to said rebellion, but was throughout the war loyal to the Government of the United States, and the fact of such loyalty *shall be a jurisdictional fact.*

And in the special act authorizing this suit (22 Stat. L., 804) is the following:

> *Provided, however*, that it be shown to the satisfaction of the court that neither Sterling T. Austin, Sr., nor any of his surviving representatives gave any aid or comfort to the late rebellion, but were throughout the war loyal to the Government of the United States.

And in *De Groot* v. *United States*, 5 Wall., 432, this court said:

> And no reason can be perceived why Congress may not at any time withdraw a particular case from the cognizance of that court (Claims), or prescribe in such case the circumstances under which alone the court may render a judgment against the Government.

In the case of *Haym* v. *The United States* (26 C. Cls. R., 167), decided February 9, 1891, the case was under consideration on the preliminary question of the claimant's loyalty. The claimant relied on a finding of the court in his favor on the question of loyalty in a former suit under the abandoned or captured property act. It appears that such finding was made solely on a warrant of pardon issued to the claimant by the President.

In passing upon the question the Court of Claims said (p. 172):

> In this class of cases it is not a question whether the party has or has not been restored to a condition of legal innocence. What the court is here engaged in doing is finding facts by judicial process for the assistance of Congress. The first fact to be found, according to the jurisdictional authority (the statute), is the fact of the claimant's loyalty through a defined period. If that can not be found no other may be.

PARDON CAN NOT RESTORE MONEY COVERED INTO THE TREASURY.

The eighth finding of fact (p. 7) ascertained that certain cotton of the claimant had been captured and turned over to the Treasury agents and that, "on the 350 bales seized as aforesaid the *defendants* have realized the sum of $59,287."

In *Knote* v. *United States* (95 U. S., 149) personal property of the claimant was condemned and forfeited to the United States and sold and the proceeds paid into the Treasury of the United States. The proceedings and sale took place under the confiscation act of July 17, 1862. By virtue of the amnesty proclamation of the President

of December 25, 1868, the claimant was pardoned and relieved of all disabilities and penalties attaching to the offense for which his property was confiscated. His petition averred all these facts; upon demurrer the petition was dismissed. The case was brought by appeal to this court.

Mr. Justice Field, delivering the opinion of the court, after referring to *Klein's Case, supra*, said:

> The effect of a pardon upon the condition and rights of its recipient have (*sic*) been the subject of frequent consideration by this court, and principles have been settled which will solve the question presented for our determination in the case at bar. *Ex parte Garland*, 4 Wall., 333; *Armstrong's Foundry*, 6 Wall., 766; *U. S.* v. *Padleford*, 9 Wall., 531; *United States* v. *Klein*, 13 *ibid.*, 128; *Armstrong* v. *United States*, *ibid.*, 155, etc. A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power. * * * But it does not make amends for the past. * * * It does not give compensation for what has been done or suffered, nor does it impose upon the Government any obligation to give it. * * * So, also, if the proceeds have been paid into the Treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. * * * However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers, it can not touch moneys in the Treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power.

PARDON DOES NOT DISPENSE WITH PROOF OF JURISDICTIONAL FACT.

In *De Groot* v. *United States* (5 Wall., 431) this court, speaking of the limitations to the jurisdiction of the Court of Claims, said:

> If, therefore, the Court of Claims has the right to entertain jurisdiction of cases in which the United States is defendant, and to render judgment against that defendant, it is only by virtue of acts of Congress granting such jurisdiction, and it is limited precisely to such cases, both in regard to parties and to the cause of action, as Congress has prescribed. * * * And no reason can be perceived why Congress may not at any time withdraw a particular case from cognizance of that court, or prescribe in such case the circumstances under which alone the court may render a judgment against the Government.

And in the class of cases arising under the Bowman Act, known as "Congressional cases," which have come before the Court of Claims since the proclamation and amnesty, it has been held by that court that where loyalty had been a jurisdictional fact it must be proven before the court entered upon the consideration of the merits of the case.

In *Osborne's Executor* v. *United States* (24 C. Cls. R., 420) it was said:

> This jurisdictional restriction, therefore, is strictly personal. It does not relate to the cause of action nor to the *locus* of the transaction, nor does the finding of loyalty affect or relate to the merits of the cause. The law simply forbids the claimant to speak or the court to listen until it be primarily established

that the person from whom the property was taken was an adherent and not an enemy of the United States.

See, too, *Kirtley* v. *United States* (27 C. Cls. R., 349).

In *United States* v. *Klein*, *supra*, the "Drake amendment" had no relation to the jurisdiction of the court; it prescribed no jurisdictional facts; it did not furnish a rule which was to be of equal and uniform application. But, as was said by this court in that case, it prescribed: "a rule for the decision of a cause in a particular way." It required that when in any cause, pending in a lower or an appellate court, it appeared that judgment must be rendered for the claimant, because of a pardon granted, that the jurisdiction of the court should thereupon cease and the cause be dismissed.

The effectuation of such a statute by this court would indeed have been "a blot upon the jurisprudence of the country."

The statute was not an amendment of the act conferring jurisdiction upon the court; it formed no part of the law under the beneficent provisions of which persons having claims against the Government were permitted to apply to the court for their adjudication. But it was proposed as a sort of penal condition to an appropriation bill, while as shown above, the jurisdiction of the court rests upon the statute alone which confers it and can be invoked and exercised only in accordance with the statute and subject to the terms and conditions which it imposes.

HOLMES CONRAD,
Assistant Attorney-General.

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JAMES H. McKE

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

FLORINE A. AUSTIN, ADMINISTRATRIX OF Sterling T. Austin, deceased, appellant,
v.
THE UNITED STATES.
No. 39.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN REPLY.

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APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN REPLY.

Since the brief for the Government was filed in this case two briefs have been filed on behalf of the appellant, the fullness and apparent earnestness of which seem to require that the views there presented should be further considered.

Two positions are taken and sought to be maintained on behalf of the appellant.

(1) That the act for the relief of the representatives of Sterling T. Austin, deceased, approved March 3, 1883, was but a revival and extension of the captured and abandoned property act.

(2) That the proviso to the Austin act does not make the jurisdiction of the Court of Claims in this matter to depend upon the preliminary ascertainment of the loyalty of Sterling T. Austin and his representatives.

ARGUMENT.

The captured and abandoned property act has been so often the subject of judicial consideration as to render unnecessary the extended citation of decisions here.

Section 3 provides:

> Any person claiming to have been the owner of any such abandoned or captured property may at any time within two years after the suppression of the rebellion prefer his claim to the proceeds thereof in the Court of Claims. And on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof.

The material constituent elements of this section are:

(1) The person must claim to have been the owner of the property.

(2) He must prefer that claim within two years after the suppression of the rebellion.

(3) He must prove to the satisfaction of the court—

(*a*) His ownership of the property;

(*b*) His right to the proceeds thereof;

(*c*) That he has never given any aid or comfort to the present rebellion.

These requirements of allegation and proof must all have been complied with to entitle the claimant to relief.

The judicial power of the United States is vested in the Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

The Constitution defines the limits of the judicial power, but Congress prescribes how much of it is to be exercised by the Federal courts.

The Court of Claims exercises only such jurisdiction as Congress confers upon it. Under the captured and abandoned property act it had jurisdiction to hear and determine all cases coming within the class and subject to the conditions prescribed in that act.

An essential element in every judgment against the United States upon a claim preferred under the captured and abandoned property act was that the claimant had never given any aid or comfort to the rebellion. This was not a jurisdictional question to be ascertained by the court preliminary to a consideration of the case upon its merits, but it was an integral part of the claimant's case, as much so as his ownership of the property, or his right to its proceeds.

On the 25th of December, 1868, the President of the United States issued a proclamation in which he announced a universal amnesty and pardon for participation in the rebellion—"unconditionally and without reservation—to all and every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late

civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof."

In many cases already cited in the briefs this court has held that the effect of this general amnesty and pardon was to dispense with proof of the claimant's loyalty in cases arising under the captured and abandoned property act.

The benefits arising under this act could be enjoyed by those only who availed themselves of its terms by preferring their claims within two years after the close of the rebellion.

In some instances, however, it appeared that sufficient reason existed for extending those benefits to persons who, for reasons beyond their control, had not been allowed to prefer their claims within the prescribed time. And to these persons, in some instances, Congress, by special act, extended the benefits of the captured and abandoned property act, by allowing them to file their petition in the Court of Claims after the expiration of the two years. But it took care in these special acts to leave nothing to inference, but stated expressly that such claims were to be considered under the captured and abandoned property act.

Among these cases may be instanced the one which appears in the case of *Rice, assignee* v. *The United States* (21 C. Cls. R., 413), where, by an act of Congress of February 5, 1877, it was provided:

> *Be it enacted,* * * * that the Court of Claims may take jurisdiction under the provisions of the act of March 12, 1863, entitled "*An act to provide for the*

> *collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,"* of the claims of Robert Erwin, of Savannah, Ga., for property alleged to have been taken from him, which claims were by accident, or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act.

Here was a plain, express, and unequivocal declaration, in the act extending the jurisdiction of the Court of Claims, that the case submitted to it was to be considered as within the captured and abandoned property act.

It is insisted by counsel for appellant here that the act for the relief of the representatives of Sterling T. Austin, deceased, which was approved March 3, 1883, operated, and was intended by Congress to operate, so as to bring the case therein authorized to be instituted within the purview of the captured and abandoned property act.

Now, the Austin act is as follows:

> *Be it enacted,* * * * that the claims of the successors in interest and legal representatives of Sterling T. Austin, deceased, late of the parish of Carroll, in the State of Louisiana, for cotton taken by the military or civil authorities of the United States, or by either of them, during the years 1863, 1864, and 1865, in the States of Louisiana and Texas, be, and the same are hereby, referred to the Court of Claims with full jurisdiction and power in said court to adjust and settle such claims, and to render a judgment in said cause for the net amount realized by the United States from the sale of such cotton, as shall appear from the evidence to have been so taken by said authorities. And in such action the said representatives shall be entitled to recover as

> aforesaid, any statute of limitations to the contrary notwithstanding: *Provided, however*, That it be shown to the satisfaction of the court that neither Sterling T. Austin, senior, nor any of his surviving representatives gave any aid or comfort to the late rebellion, but were, throughout the war, loyal to the Government of the United States.

The argument of the learned counsel, in their additional brief for appellant, appears to be that the relief afforded by the special Austin act is the same as that provided by the general captured and abandoned property act, and that, therefore, the Austin act is but the captured and abandoned property act revived. Indeed, on page 38 of the brief, referring to the waiver in the Austin act to the bar of limitations, he says:

> Therefore the provision in the Austin act which says, "and in such action the said representatives shall be entitled to recover as aforesaid, any statute of limitations to the contrary notwithstanding," is a limited and special revivor of the captured and abandoned property act in favor of Sterling T. Austin and his representatives, for the purposes of this action. And by virtue of said revivor he became entitled to all the benefits of the captured and abandoned property act, except where the provisions of the Austin act, if any there be, are in conflict with those of the captured and abandoned property act; and he became entitled to these, including all the benefits resulting from the interpretation of that act as settled by the courts.

With great deference to the learning and ability of the author of that brief, I venture to say that it is open to

one slight but insuperable objection. The conclusion which it sets out to establish, to wit, that the Austin act is but the captured and abandoned property act revived, is really assumed as a postulate and forms the minor premise of the argument.

The authorities cited in the brief relate to cases in which laws have been revived by express reenactment, or by the repeal of a repealing clause. But neither of these exist in this case. While the captured and abandoned property act has never been repealed, nor has it expired by its own limitation, yet has it been practically inoperative since December, 1868, the period after which it was not allowed to prefer claims in the Court of Claims under that act.

Had it been the intention of Congress only to extend to the Austin claimants the benefits of the captured and abandoned property act, the plainest and simplest course would have been to have said so, as they did in the Erwin case, *supra*. And having employed that method of declaring its intention in that case, it is hardly just or fair reasoning to conclude that they meant the same thing under the widely different form of expression employed in the Austin case, because the subject-matter of both the general and the special act was captured property, and the object of both acts was to afford relief to claimants on the terms prescribed in such acts. One was a general law, framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard for the purpose of the legislature, are distinguished by characteristics sufficiently marked and

important to make them a class by themselves. While the Austin act was special, an analysis of it shows:

1. That it referred to "the claims of the successors in interest and legal representatives of Sterling T. Austin, deceased."

2. It was for cotton taken by the authorities of the United States in 1863, 1864, and 1865 in Louisiana and Texas.

3. That jurisdiction and power was given the Court of Claims to adjust and settle such claims and to render judgment in said cause.

4. That such judgment should be for the net amount realized by the United States from the sale of such cotton, as shall appear from the evidence to have been so taken by said authorities.

5. That in such action recovery should be had, "any statute of limitation to the contrary notwithstanding."

But all of the foregoing enactment, the grant of the privilege to claimants to sue, the grant of jurisdiction and power to the Court of Claims to hear and decide the cause, and the suspension of the bar of limitation are subject to and dependent upon—

(6) The proviso, that it be shown to the satisfaction of the court that none of the parties in interest aided the rebellion, but were throughout the war loyal to the United States. A distinguishing feature of difference between the two acts is: That in the general act, which was passed in 1863, the loyalty of the claimant is made an integral element of the plaintiff's case to be proven by him with the other facts of which his case was constituted;

while in the Austin case the act which was passed twenty years later, and fifteen years after the President's proclamation of general amnesty, it is required as a condition precedent to the exercise by the claimant of the privilege granted him; and to the exercise by the Court of Claims of any jurisdiction whatever in the case that it be shown that neither Austin himself nor any of his surviving representatives gave aid or comfort to the rebellion, but that they were throughout the war loyal to the Government of the United States.

Now, let it be noticed here that Congress has not put these claimants upon the footing of those who availed themselves of the benefits of the captured and abandoned property act. In the analysis of that act we saw that it was required of the claimant that he should prove that "*he* had never given any aid or comfort to the present rebellion," while of the Austin claimants it was exacted that it be shown to the satisfaction of the court that *neither Sterling T. Austin*, senior, nor *any of his surviving representatives*, gave any aid or comfort to the late rebellion, *but were throughout the war* loyal to the Government of the United States.

The "representatives" here does not refer to executors or administrators, but to the heirs at law of the decedent. (See *Randolph* v. *United States*, 21 C. Cls. R., 282.)

And to neither the decedent, nor to any of his representatives, was any time or place of repentance allowed. But of all of them it was required that they should prove the negative fact that they had not given aid or comfort; and the affirmative fact that *throughout the entire rebellion* they were loyal to the United States.

How, then, can it be said that the Austin act is but a "reviver" of the captured and abandoned property act; that the "words in the Austin proviso and the loyalty clause in section 3 of the captured and abandoned property act *are the same in substance.*"

But now the learned counsel having reached this stage of the argument in their brief, having demonstrated that the captured and abandoned property act of 1863 and the Austin act of 1883 "are the same in substance," standing upon that stable structure, insist that the requirement of proof of loyalty in the proviso of the Austin act is not *jurisdictional*, because the loyalty feature of section 3 of the act of 1863 was not made jurisdictional.

WHAT IS THE EFFECT OF THE PROVISO OF THE AUSTIN ACT?

> The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain it generally, or to exclude some possible ground for misinterpretation of it as extending to cases not intended to be brought within its purview. (*Minis* v. *United States*, 15 Pet., 423.)
>
> And as to a proviso, it has been said that its function is that of limiting the language of the lawmaker, not of enlarging or extending the act, or section of which it is a part, and its effect that of negativing an authority granted beyond its prescribed and clearly defined limits. (*Endlich on the Interpretation of Statutes*, sec. 184.)

The proviso here is not to any clause or section of the act, but to the entire enacting clause itself. It therefore operates as a limitation to the whole act and must be

taken to declare the intent of the legislature; that the benefits conferred by the enacting clause are to be received and enjoyed under the limitations and restrictions of the proviso. And this view derives additional support from the fact that on the same day, March 3, 1883, on which the Austin act was approved and became operative (22 Stat., 804) another act was approved. It is entitled "An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government." (22 Stat., 485.)

This act, too, provides for *referring* to the Court of Claims such—

> Claims or matters pending before any committee of the Senate or House of Representatives, or before either House of Congress, which involves the investigation and determination of facts. * * *

And for *transmitting*—

> * * * Claims or matter pending in any of the Executive Departments which may involve controverted questions of fact or law.

This act provides that in any case of a claim for supplies or stores taken by or furnished to any part of the military forces of the United States—

> The petition shall aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, *did not give any aid or comfort to said rebellion, but was throughout the war loyal to the Government of the United States*, and the fact of such loyalty shall be a jurisdictional fact, etc.

It will be observed that the words italicized are precisely those used in the proviso of the Austin act. And

it will be further noticed that this fact is made jurisdictional here in express terms, because from the structure of the act it could not conveniently have been made jurisdictional by a proviso as was done in the Austin act. But both acts being passed on the same date, by the same body, and doubtless through the same committee, and employing, as to the condition of loyalty, precisely the same language, it can hardly be thought unreasonable to conclude that they had employed that language to express one common object as to the effect of the requirement as to *loyalty*.

To give to the Austin act the effect claimed for it by appellants, it will be necessary to reform it altogether so that jurisdiction is conferred absolutely upon the Court of Claims to hear and determine the case; and the proviso, instead of qualifying the grant of jurisdiction, is confined in its application to the right of the claimants to recover, so that the closing paragraph would read:

> And in such action the said representatives shall be entitled to recover, as aforesaid, any statute of limitation to the contrary notwithstanding, provided, however, that it be shown. * * *

So that the right of claimants to recover would be conferred by a separate paragraph, to which alone the proviso attached. But, it will be observed, that not even in the record here is justice done to the full import and significance of the proviso; for, while on page 1 of the record, where the Austin act is set out, the proviso is so stated as to qualify all that precedes it, yet in the original act (22 Stat. L., 804), the words "*Provided, however,*" are italicized, so as to convey unmistakably the meaning of

Congress that the enacting clause throughout, with all its grants of privileges and powers, is to be taken subject to the condition imposed by the proviso.

But, it is insisted further, that inasmuch as the Austin act confers upon the Court of Claims the power to render a judgment, that the requirement of the proviso, that the fact of loyalty shall be a jurisdictional fact, is an attempt by Congress to "prescribe for the courts what effect should be given to the amnesty as constituting proof of loyalty in fact, as well as legal loyalty." Of course, this is an attempt to apply to this case the principles invoked and the rules applied by the courts to that preposterous attempt to defeat the effect of the President's proclamation, known as the "Drake amendment," which this court passed upon in the *Klein Case* (13 Wall., 146).

Attention has heretofore been called to the fact that all the cases in which this court and the Court of Claims have held the President's proclamation of general amnesty to dispense with proof of loyalty, were cases arising under the captured and abandoned property act. In no case has it been held that that proclamation, or any special pardon granted and accepted upon terms prescribed, could dispense with proof of a fact which Congress had prescribed as a condition-precedent to the exercise of jurisdiction at all.

> Where special powers are conferred on a court, either of otherwise general or limited jurisdiction, it is rigorously restricted to those granted, and the grant itself is strictly construed, the jurisdictional facts must appear on the face of the proceedings. The court can take no additional power from its general

> jurisdiction. In the exercise of such special powers it is precisely limited to those plainly delegated. Nothing is to be presumed which is not expressly given. (Sutherland on Statutory Construction, sec. 391.)

In *United States* v. *Klein*, *supra*, which was a case under the captured and abandoned property act, in which the Court of Claims had power to render judgment, the objection was not made to the action taken by the Court of Claims on the ground that Congress could not prescribe the course of proceeding in a case in which the court was competent to render a judgment, but it is placed distinctly on the ground that—

> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe *rules of decision* to the judicial department of the Government in cases pending before it?

In *Harry Haym* v. *The United States* (26 Ct. Cls., R., 167), the court said:

> In this class of cases it is not a question whether the party has or has not been restored to a condition of legal innocence. What the court is here engaged

> in doing is finding facts by judicial process for the assistance of Congress. The first fact to be found, according to the jurisdictional authority (the statute) is the fact of the claimant's loyalty through a defined period. If that can not be found, no other may be.

In *Hart* v. *The United States* (118 U. S., 62), the Secretary of War, on the 14th of October, 1873, transmitted to the Court of Claims the claim of Henry B. Hart, as the assignee of Simeon Hart. Thereupon, on the 9th of January, 1874, Simeon Hart, for the use of Henry B. Hart, filed in that court a petition, claiming to recover from the United States $50,391.52. To this petition the United States filed a plea of set-off.

It appeared that in 1861 Simeon Hart was in active sympathy with the rebellion. On the 3d of November, 1865, the President granted to him a full pardon and amnesty for all offenses, etc.

By a joint resolution approved March 2, 1867, now section 3480, Revised Statutes, it was provided:

> Until otherwise ordered, it shall be unlawful for any officer of the United States Government to pay any account, claim, or demand against said Government which accrued or existed prior to 13th of April, 1861, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion; or in favor of any person who during said rebellion was not known to be opposed thereto and distinctly in favor of its suppression; and no pardon heretofore granted, or hereafter to be granted, shall authorize the payment of such account, claim, or demand, until this resolution is modified or repealed.

It was urged before the Court of Claims that the pardon granted by the President to Hart, in November, 1865,

operated to set aside the provision of the joint resolution as to him and his claims.

The Court of Claims held otherwise.

> Its view was that Hart was guilty of numerous acts for which he could on conviction have been punished in his person and his property, and that the pardon freed him from liability for those offenses; that his disability to receive from the United States a debt due to him was not a consequence attached to or arising out of any such offense; that it grew out of the fact stated in the joint resolution that he had been a public enemy; that every disability which a state of war imposed upon him was removed by the cessation of the war; that it needed no pardon to effect that result; that as the pardon conferred on him no new right, so the joint resolution did not take from him anything which the pardon had conferred; that it did not, like the legislation considered in *United States* v. *Klein* (13 Wall., 128), attempt to prescribe to the judiciary the effect to be given to a pardon in regard to a matter to which the pardon extended, but merely forbade certain debts to be paid until Congress should otherwise order.

This court approved the reasoning of the Court of Claims and said:

> It was entirely within the competency of Congress to declare that the claims mentioned in the joint resolution should not be paid till the further order of Congress.

Now, the "claims in the joint resolution" were the claims of those who had been engaged in rebellion, and it was solely on the ground that they had been engaged in rebellion that Congress forbade their payment. It was

argued that pardon had wiped out the offense of rebellion, and that the reason ceasing the rule should cease. But this court said no, Congress had the right to take notice of the fact of their participation in rebellion, and for that cause to suspend payment to them despite the pardon.

With how much greater force may it be urged here that the President's proclamation of general amnesty could neither give nor take away jurisdiction from the Court of Claims. Congress alone had power to grant, limit, nor take away that jurisdiction. Just as Congress had the power to determine to what classes of persons the officers of the Government should or should not make payment of claims, so it had power to determine what classes of persons should be recognized in the Court of Claims.

The jurisdiction of the Federal courts is determined by the character of persons and of subject-matter and locality, by the amount in value of the thing sued for, and by the residence of the suitor.

It was in the exercise of this power that Congress prescribed to the claimants here and to the Court of Claims the conditions expressed in the proviso, and these are in nowise affected by the President's proclamation of pardon, nor can this power of Congress be any more affected by an act of the President than was the power of this court affected by the "Drake amendment" in the Klein case.

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Assistant Attorney-General.

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